No. 20196

UNITED STATES COURT of APPEALS

FOR THE NINTH CIRCUIT

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Appellant,*

vs.

CITY OF SEATTLE, *Appellee.*

CITY OF SEATTLE, *Appellant,*

vs.

PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, *Appellee.*

On Appeal from the Judgment of the United States District Court for the Eastern District of Washington

FINAL BRIEF OF APPELLANT-APPELLEE, PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WITH APPENDIX

Part I. Reply to Answering Brief of City of Seattle as Appellee

Part II. Answer to Opening Brief of City of Seattle as Appellant

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THE FRANKLIN PRESS, SPOKANE

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EXPLANATORY NOTE

Pursuant to the stipulation of July 16, 1965, the appellant-appellee, Public Utility District No. 1 of Pend Oreille County (PUD), submits this final brief in two parts. Part I. is PUD's reply to the answering brief of the City of Seattle (Seattle) as appellee. Part II. is PUD's answer to the opening brief of Seattle as appellant. Designation to the record will be made in the same manner as was done in PUD's opening brief.

PART I.

REPLY TO ANSWERING BRIEF OF SEATTLE AS APPELLEE

Comments Re Seattle's Counterstatement of the Case:

On pages 2 to 6 of its answering brief, Seattle seeks to create the impression that in the license application proceedings before the Federal Power Commission and in the appeal of the Commissioner's

Order to the Court of Appeals for the District of Columbia, and in the so-called Beezer litigation in the state courts of Washington, there was a determination that the PUD's properties being here condemned were not "electrical" properties or useful as electrical properties. The fact is that the decision of the Federal Power Commission (Ex. P. 9) says on page 6:

> *"The evidence shows that certain portions of the bed and banks of the Pend Oreille River owned by the PUD are indispensable to construction of the City's proposed Boundary project,"*

and on page 7:

> "The properties with which we are here concerned do not include any which were or are now being used in connection with the PUD's Box Canyon project. *On the other hand, they are also indispensable to the construction of either of PUD's alternative projects in the event that a license or licenses are issued therefor."* (Emphasis supplied.)

In the decision by the Court of Appeals for the District of Columbia Circuit (308 F. 2d 318), it was actually said by the court at page 323:

> "The record does not show that the property here involved is used by PUD in its operations, or that in the future it will be useful to PUD in any way *except in connection with its Z Canyon project . . .*" (Emphasis supplied.)

On page 8 of its answering brief, Seattle erroneously describes the PUD's right, privilege, and authority originally granted under Washington Session Laws of

1907, Chapter 125, to perpetually back the water of the Pend Oreille River upon and overflow and inundate with said water certain shore lands on both sides of the Pend Oreille River as one which extends from "Lime Creek south to the tailwater of Box Canyon Dam, a distance of about 15 miles, or 2400 chains." The Z Canyon damsite is approximately 2 miles north and downstream from Lime Creek, and the aforementioned right extends from the Z Canyon damsite to the Box Canyon dam, which is a distance of approximately 17 miles. In the area upstream from the Z Canyon damsite to Lime Creek, PUD holds both the aforementioned rights granted under the 1907 Act and the fee title to the shore lands. The record shows that the rights under the 1907 Act, as they affect the area upstream from the Z Canyon damsite to Lime Creek, have consistently been recognized as existing separate and apart from the fee ownership of shore lands in this area. Even though there has been a common ownership, separate conveyances have been made. (Exs. P. 1, 4 and 6).

In considering the nature of the perpetual rights acquired under the 1907 Act, it must be remembered that they were specifically applied for and granted for use in connection with the erection and operation of a dam and water power plant. (Ex. P. 1.)

On page 9 of its answering brief, Seattle says, "The map reproduced by the PUD in its brief following

page 6 is inaccurate in that it represents that the PUD had some right or title to the bed of he Pend Oreille River." Seattle is inaccurate. In the first place, it disregards RCW 54.16.050, first enacted in 1931, which provides:

> "Water rights . . . the district may erect, within or without its limits, dams or other works across any river or watercourse, or across or at the outlet of any lake, up to, and above high water mark; and, for the purpose of constructing or laying aqueducts or pipe lines, dams, or waterworks or other necessary structures in storing, retaining, and distributing water, or for any other purpose authorized hereunder, *the district may occupy and use the beds and shores up to the high water mark of any such lake, river, or watercourse.*" (Emphasis supplied.)

Furthermore, when the state, which owns the shore lands, as well as the bed of the river and the waters of the river, grants the right to perpetually back and hold the water upon and over the shore lands and to overflow and inundate the same, it is sheer nonsense to say that the grantee cannot also back and hold the water upon and over the bed of the stream. If such a grantee could not back and hold the water upon and over the bed of the stream, it would take a Jordan River miracle to give any meaning to the grant.

In reviewing the testimony of its witnesses as to value, Seattle seeks to avoid the impact of the district court's specific finding that the valuation expressed by those witnesses included no power site value.

> "The testimony of power site value as expressed by witnesses for the defendant having been stricken, the only evidence in the record as to value is that testified to by witnesses for the plaintiff which includes no power site value." (R. 94.)

Seattle says that its witness, Butler, gave full consideration to the adaptability of the property for reservoir purposes and then concluded there was no difference in valuation whether he included or disregarded "the adaptability of the properties for reservoir purposes." It is significant that the reference is to reservoir purposes and not to damsite purposes. During the trial counsel for Seattle made this same contention that its witnesses in their appraisal had considered the adaptability of the property for power site purposes. That contention was then rejected as follows:

> "THE COURT: I can't go along with that, counsel, I don't think your witnesses did. Quite to the contrary, I think.
>
> "MR. WHITE: Well, I think that they testified that they did consider the power site. I think I can cite you the record on that, on both of them, but —
>
> "THE COURT: You mean they considered it, but rejected it?
>
> "MR. WHITE: Yes, that is right.
>
> "THE COURT: Is that considering it?
>
> "MR. WHITE: I think so, I think you have to consider it in order to reject it. If you don't consider it at all, that is something different.

"THE COURT: No, it is still a rejection, I would say." (R. Tr. 383.)

At the time the Findings of Fact were presented to the court for settlement, the district court specifically rejected Seattle's contention that there is no measureable difference between the values of defendant's properties and rights whether or not consideration is given to their adaptability for power site purposes. Seattle's proposed Finding No. XIX. was to this effect (R. 65). In rejecting this proposed Finding, the district court said:

"THE COURT: It just seems to me that No. 19 could very well come out of plaintiff's requests.

"In other words, I don't desire the finding, I desire that there be no finding that there is no difference between values.

"Certainly I don't think anybody would want to buy this rock bluff at Z Canyon for pasture purposes or reforestation, *but it certainly has some value as a power site.*" (R. PCF 20, Emphasis supplied.)

At this same hearing, held after the trial had been completed, the following colloquies took place:

"THE COURT: Do you know of any place in the Northwest where there are two power sites this close together as these two are? And as good as these two?

"MR. WHITE: As close together and as good?

"THE COURT: Yes.

"MR. WHITE: Well, I don't know. I suppose there are, but I can't think of any offhand." (R. PCF 17.)

"MR. DILL: I am very much confused by the Court's remarks this morning, that neither of these findings reflected the view or the presentation of value that the Court had in mind.

"THE COURT: I didn't say 'presentation of value.' I may have a different idea as to what the value is, and what I said, as I recall it, is *that I have a different idea of what the value is than the testimony of either the plaintiff or the defendant.*

"MR. DILL: Is that as a juror?

"THE COURT: Yes. No, I can't do it as a juror, on anything but the evidence, and *I haven't heard any evidence that reflects what I think the value of this property is.*

"MR. DILL: May I suggest that as a juror your Honor would be bound by what the evidence showed.

"THE COURT: That is true. I am bound by it. I can't go out, as Mr. White refers to it, into the wild blue yonder, and dig up some evidence of my own.

"MR. DILL: Well, I don't want to go into the other arguments. I was just curious, and somewhat confused.

"THE COURT: Well, perhaps I am, too." (R. PCF 47, emphasis supplied.)

Seattle's resume of the testimony of its witnesses on value, the colloquies quoted above, and the Findings of Fact finally entered by the district court point up the untenable posture of this case. It will be remembered that, pursuant to agreement at the time the case was called for trial, Seattle, as condemnor, put in its case first. During this stage of the proceedings, the testimony of Seattle's witnesses, who valued the PUD properties as reforestation lands and without any consideration of power site value, was admissible in support of Seattle's theory of the case that the action did not involve a power site. The Findings of Fact ultimately entered by the court show that PUD, in its case, established the following:

1. That it owned and held the private properties and rights constituting the principal and indispensable essentials for unique and excellent damsites, one of which had been partially developed;

2. That, except for a few scattered small tracts and a relatively few acres of federal lands that had been specifically set aside for power site purposes, it owned the properties and rights necessary for a power project; and

3. That beyond question the highest and best use of its properties being condemned was for hydroelectric power purposes.

The establishment of the foregoing by the PUD in its case rendered of no probative value the testimony

of value as expressed by Seattle's witnesses during its opening case. They had appraised reforestation lands, and it had thereafter been established that the action in fact dealt with a magnificent work of nature ideally designed for the production of electric power and for which there could be no "going market" as such properties are seldom exchanged. (See photographs Exs. D. 113 and 114.)

In determining "just compensation" it is well established that the availability of the subject of the condemnation for a special purpose or use must be considered as an element of value. 18 Am. Jur., Eminent Domain, Sec. 247, p. 885. In *Boom Co. v. Patterson,* 98 U. S. 403, 407-408, the United States supreme court said:

> "... In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, *or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated.*"
>
> (Emphasis supplied.)

PUD's application to the FPC was denied because that Commission believed PUD did not then have a market for the power and could not finance a project whereas Seattle, in the Commission's opinion, needed the power and could finance the project (Ex. P. 9).

Whatever may be the special use, that use is to be considered in fixing "just compensation." Such special use, of course, must not be so speculative and remote as to impart no value. In the case at bar, there has been such long historical recognition that the properties in question are chiefly valuable for dam sites and power project purposes that their value and use for such purposes cannot, by any stretch of the imagination, be labeled as "remote" and "speculative." As early as 1910 the government set aside the adjacent federal lands for power site purposes. Colonel Cooper commenced putting the properties and rights together before 1915. The State of Washington granted perpetual rights for power project purposes in 1915. Seattle is acquiring the properties and rights for this very use.

In its rebuttal, Seattle offered no further testimony of value.

The district court having struck from the record the conclusions of value expressed by PUD's witnesses who had appraised the property in the light of its highest and best use, the record was bereft of any expert valuation opinions upon which the district court could make

an award of "just compensation." The district court admitted this was the situation at the time the Findings of Fact were settled. When Finding No. XX (R. 94) was being discussed, the following took place:

> "MR. WHITE: Your Honor, counsel is inviting your Honor to just go off into the wild blue yonder in speculation, whereas I believe this is the testimony in the record.
>
> "THE COURT: That would be true, Mr. White, if I stated in there what I thought the value was, *because there is no evidence to support what I think the value is,* and I think I am bound by the testimony in the case.
>
> "MR. WHITE: That is all I am asking. That is the testimony.
>
> "THE COURT: That is all the defendant is asking, also, although he embellishes it somewhat by including my statement *that I don't think there has been testimony on values here."* (R. PCF 46, emphasis supplied.)

In the face of these facts, the district court judge nevertheless did go off "into the wild blue yonder" and used the opinions of value expressed by Seattle's witnesses in its opening case which had been stripped of probative value by later proof introduced by PUD and made an award of $16,000. In the Judgment and Decree (R. 96) this award is described as "just compensation."

Immediately following the entry of the Findings of Fact and Conclusions of Law and Judgment and De-

cree, the PUD moved for a new trial on the grounds, among others, that it was error to consider the valuation testimony of Seattle's witnesses who admittedly did not appraise what was being condemned. This motion was denied (R. 105).

Seattle, in its answer to PUD's Specification of Error No. 1, which is based upon the trial court's rejection of evidence concerning the cost and capacity of a dam and power house at the Boundary site, which is immediately downstream from the Z Canyon site, attempts to support the district court's conclusion that such evidence was rendered inadmissible under the "value to the taker" doctrine. This label doesn't fit the offered evidence, which was just as admissible as was the evidence with reference to the cost and capacity of a dam at the Z Canyon site which was received in the record. PUD owned the indispensable lands and rights which, together with adjoining federal lands already set aside for power site purposes, constituted, for all practical purposes, the lands and rights necessary for a hydroelectric project whether the dam and power house were placed at the Z Canyon site or at the nearby Boundary site. Seattle makes no attempt to explain away the following statement made by the supreme court in *Grand River Dam Authority v. Grand Hydro* at p. 372 of Vol. 335 of the U. S. Reports:

> "The present large development of this site by the petitioner under a federal license is *convinc-*

ing proof of the value and availability of the land for that purpose.'' (Emphasis supplied.)

At this particular point in its brief, Seattle seeks to further justify the striking of the evidence of cost and capacity of a dam project that could be built and is being built at the Boundary site by arguing that a developer of a project with the dam and power house at the Boundary site might not be able to acquire a few scattered tracts except by condemnation. This argument will be answered later in this brief.

In replying to Seattle's attempt to support the district court's rulings striking the conclusions of value as expressed by PUD's witnesses, it is important to note the strait jacket the district court put upon the PUD and its valuation witnesses. The court adhered to a literal definition of "market price" and took the view that there are three and only three methods of arriving at "fair market value," these being reproduction cost, less depreciation, capitalization of income, and comparable sales. At the outset the court said:

> "THE COURT: I believe this is the first time that the PUD has indicated the measure it intended to use to establish its testimony of fair market value. I am still at a loss to know what the evidence may be.
>
> "Now, I think that somewhere very soon there should be a discussion about this subject. I don't know exactly whether this particular testimony

> will come within or whether it is outside of the three methods, the three approved methods, of appraisals of property." (R. Tr. 493-494.)

The court, although urged to do so, refused to recognize the teaching of *Kimball Laundry Co. v. United States,* 338 U.S. 1; *United States v. Cors,* 337 U.S. 325; *United States v.* 93,970 *Acres,* 258 F. 2d. 17; *Phillips v. United States,* 243 F. 2d 1; and *Washington Water Power Co. v. United States,* 135 F. 2d 541.

Justice Frankfurter pointed out in the *Kimball Laundry* case that the concept of "market price" is at best only a guess, and that there were situations where none of the three so-called approved methods of appraisal could be used as a means of ascertaining just compensation. He said on page 6:

> "When the property is of a kind seldom exchanged, it has no 'market price' and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights."

Our attention has just recently been called to the unpublished opinion of federal district Judge W. J. Jameson wherein he determined $4,500,000 was the just compensation due the Crow Tribe of Indians for the taking of the Yellowtail dam site on the Big Horn River in Montana. This opinion is very much in point and completely demonstrates the propriety and admissibility of PUD's valuation testimony. For the convenience of this Court, Judge Jameson's pretrial rul-

ling and unpublished opinion are included in the appendix to this brief. A review of the ruling and opinion are seriously urged. No appeal was taken from Judge Jameson's decision. Counsel in the case advise that the government accepted the decision as final and made payment accordingly.

A few comparisons with the Yellowtail project are revealing.

PUD's Proposed Project at Z Canyon:	Direct Construction Costs Exclusive of Site Costs	Capacity
High Z	$62,100,000 (R. Tr. 682)	555,000 Kws. (R. Tr. 649)
Low Z	$56,420,000 (R. Tr. 710)	345,00 Kws. (R. Tr. 712)
Yellowtail:		
Owner's witness, Jones	$79,655,000 (App. p. 25)	
Government witness, Patterson	$95,827,650 (App. p. 27)	250,000 Kws. (App. p. 38)

If a site that lends itself to the construction of a power plant with a capacity of 250,000 kiolwatts at direct costs somewhere between $80,000,000 and $96,000,000 is worth $4,500,000, a site such as the Z Canyon area which lends itself to the construction of a power plant with a capacity of 555,000 kilowatts at direct costs of approximately $62,000,000 is worth a great deal more than $4,500,000. As Judge Jameson says in the Yellowtail decision when referring to an increase in the capacity of the Yellowtail project,

> "Obviously, the increase of capacity from 200,000 to 250,000 kilowatts with little, if any, additional cost would result in an increase in the value of the site." (App. p. 39.)

In the case at bar the project has more than twice the capacity of the Yellowtail project, and construction costs are less.

Also, in considering the $4,500,000 award in the Yellowtail case, it should be noted that in the definite plan report for the Yellowtail project prepared and filed by the United States Department of Interior, Bureau of Reclamation, and referred to by Judge Jameson, it was estimated that the Yellowtail project involved clearing costs and relocation costs of $2,772,800.

The Crow tribal lands involved at the Yellowtail site constituted 5,677,94 acres out of a total project acreage of 30,857 acres. In addition to the tribal lands, the Yellowtail project required 10,778 acres of private land, 2,486 acres of state land, and 10,604 acres of federal land (App. p. 18, 19).

PUD's proposed High Z project with a 200 foot buffer zone would require 2,547.2 acres. In addition to PUD's lands and rights, this required only 143.2 acres of private lands, 2.6 acres of state land, and the use of 793.4 acres of federal lands. Without the 200 foot buffer zone, the High Z project required 2,198 acres and called for the acquisition of only 47 acres of private lands and the right to use only 543 acres of federal lands (R. 88, 89). The Low Z project, naturally, would require less private lands and the use of fewer acres of federal lands.

In the case at bar it is apparent that the district court's view of the conclusions of value expressed by PUD's witnesses was affected by the substantial sums expressed. Mr. Vaughan reached a conclusion of $8,600,000 and Mr. Courtney $7,498,000. This was indicated when the district court said:

> "Certainly, I am inviting a much more nominal valuation of the property than has been placed on it, and perhaps the PUD doesn't want that, I don't know, but I will leave that observation with you." (R. Tr. 1554)

Seattle, on page 39 of its answering brief, emphasizes this by referring to Mr. Vaughan's conclusions of value as "astronomical."

In the Yellowtail case, Judge Jameson, after refering to Dr. Hershel F. Jones, economist, and J. A. Krug, former Secretary of the Interior, as "well qualified expert witnesses," said,

> "Jones and Krug expressed the opinion that the lands acquired were worth at least $12,500,000. Using 9 different methods or variations of methods, they arrive at figures ranging from $10,300,000 to $26,650,000." (App. p. 23.)

This indicates that the conclusions of value of the Z Canyon site expressed by Mr. Vaughan and Mr. Courtney were indeed modest.

As Judge Jameson points out in his decision, the Solicitor of the Interior Department, when testifying

before the Senate Committee on Interior and Insular Affairs with reference to the Yellowtail project, said:

> " . . . It is a very profound question and, to these Crow Indians, a very vital legal question, as to whether or not this power site feature is a compensable item. *If it is, they get a lot of money; in anybody's language they get a lot of money.*" (App. p. 37. Emphasis supplied.)

It is pointed out in PUD's opening brief that study was given to the appraisal methods used in the *Twin City* cases. (*United States v.* 1532.63 *Acres et al.,* 86 F. Supp. 467 (1949); *United States v.* 3928.09 *Acres et al.,* 12 F.R.D. 127 (1951); *United States v.* 3928.09 *Acres of Land et al.,* 114 F. Supp. 719 (1953); *United States v. Twin City Power Co. et al.,* 215 F. 2d 592 (CCA 4th Cir., 1954); *United States v. Twin City Power Co. of Georgia,* 221 F. 2d 299 (CCA 5th Cir., 1955); *United States v. Twin City Power Co.,* 350 U. S. 222, 100 L. Ed. 240, 76 Sup. Ct. 259 (1956).) PUD in its endeavor to follow the pattern approved in *Twin City* even retained Mr. Courtney, the distinguished hydroelectric engineer who had testified in those cases. On pages 59 and 60 of its answering brief, Seattle seeks to discredit the appraisal methods used in the *Twin City* cases because the lower court's rulings allowing power site value were reserved by the supreme court on the basis of the doctrine of dominant servitude. Judge Jameson pointed out that this reversal did not rule against the propriety of the manner in which the ex-

pert witnesses arrived at their opinions of value. In his pretrial memorandum (App. p. 6) he said:

> "Various approaches were considered by the expert witnesses in the *Twin City* cases (see 86 F. Supp. 467; 114 F. Supp. 719, affirmed 215 F. 2d 592; 221 F. 2d 299). While the Supreme Court held that dam site value could not be allowed, the approaches of the various appraisers in these cases may be of some assistance in the event this court is correct in its conclusion that water power or dam site value may be allowed in the instant case. I have obtained the transcripts on appeal in those cases and will have them available for the use of counsel if desired."

Seattle's Attack on PUD's Valuation Witnesses

Seattle would apparently support the district court's ruling striking the value opinion of PUD's witness, Vaughan, principally on the grounds that it was based on what a dam builder *could* pay for the property rather than what a willing buyer *would* pay. This analysis stems from a complete misunderstanding of the testimony of the witness.

Vaughan's opinion as to the value of the PUD properties amounted in essence to a judgment figure of what he concluded a willing buyer would pay a willing seller on the open market. This was arrived at after a careful study of all factors, both general and particular, that he believed would be considered by such buyer and seller. (App. to PUD's opening brief, pp. 12 and 24.) His opinion was influenced by several

studies he had made of neighboring hydroelectric projects of recent development and similar magnitude. In these studies he had compared from various viewpoints the neighboring projects with the type of project to which the Z Canyon site is adapted, believing that such studies would have their place on the bargaining table of prospective buyers and sellers.

These studies allowed the witness to analyze such items as the amounts that recent enterprisers in the hydroelectric field had been willing to invest in the production of given units of energy, the amounts that such enterprisers had been willing to invest in land and land rights in the development of such projects, and the cost per unit of energy produced at the neighboring projects.

It must be appreciated that modern hydroelectric projects are not in the nature of ordinary commercial manufacturing plants. They are all substantially similar in design. Their output is a constant factor primarily dependent only on the flow of the river which they harness and not on the skills or ingenuity of their operators and management. They are competitive with each other only in the sense that the total construction cost of each project determines basically the cost of each unit of energy produced therefrom. The energy thus produced does not vary in size, color, or weight whether it be produced from one plant or another.

Admittedly the comparisons made by the witness reflected to him an indication of the value of the land

and land rights of the PUD taken as a whole. However, none of these studies were offered by the witness as a direct measure of value. Some of them were used as background information for his initial estimate of value of the PUD properties and others were used as checks on the reasonableness and accuracy of that estimate. For that matter, the result of those computations was never expressed in the form of a monetary figure by the witness until it was elicited by Seattle's counsel on cross examination. It proved to be $34,000,000, nearly 4 times the estimate of the witness of the value of the properties in their present state (App. to PUD's opening brief, p. 49).

Mr. Vaughan recognized, that this figure was not representative of the fair market value of the PUD properties. This is demonstrated by his testimony on direct examination:

> "Obviously, that could not be used directly as a measure of value of the land in the present condition, anybody buying it in its present condition would be buying it for the purpose of creating this value. Obviously, he would not pay that amount for it . . .
>
> "It may take considerably longer than four years, so I have applied a discount factor to reduce that value from the indicated value subsequent to completion, to get an indication of the justified value of the rights in their present condition." (App. to PUD's opening brief, p. 20.)

and again on cross-examination:

> "As my work sheets will show on the comparison I made, the cost of land and land rights is roughly 1 cent per kilowatt hour. In valuing these, I have reduced that to 25 mills, or ¼ of that amount, because, as I have stated, the direct comparison taken from the FPC reports result in a justified or comparative evaluation, assuming all clearing had been done, all relocation had been done, the project had been erected at the estimated cost, then the comparative cost would be in the neighborhood of $34,000,000 which I have reduced to my figure of $8,700,000 to make allowance for these factors you have just been asking me about." (App. to PUD's opening brief, p. 49)

This "discount" figure, as it was called by the witness, Vaughan, or "judgment factor," as it was later called by his companion value witness, Mr. Courtney, (R. Tr. 1391) is the ultimate appraisal — it is the opinion of the witness of the fair market value drawn from the totality of his experience and knowledge as an expert in the field. It is not a direct mathematical computation. From the very nature of the property valued, it cannot be. This is a trueism which Seattle's counsel refuse to accept. They insist on seeking out a direct measure of value — a "yardstick" by which the value of the property can be measured with scientific accuracy, and in their zeal to find such yardstick, they have erroneously seized upon one of the background studies made by the witness and have attempted to apply it as a direct measure of the value of the properties — something which the witnesses themselves declined to do. If the value of such properties could

be measured with the scientific accuracy demanded by Seattle's counsel, there would be little need for expert witnesses.

Seattle has not cited a single case wherein the approach used by PUD's witnesses was rejected in the valuation of a dam site, particularly a partially-developed dam site which is herein condemned. On this issue, Seattle appears to rely entirely upon *Fairfield Gardens, Inc. v. United States,* 306 F. 2d 167, (Seattle's answering brief, p. 30) a Wherry housing project case wherein the court rejected sales of other housing projects in divergent sections of the country to establish a direct measure of the value of the project there in question, holding that such sales were not comparable. The capitalization of income approach, which is universally accepted in such cases, was readily available and was utilized and accepted by the court as the proper alternative. (It should be noted that the PUD, in desperation, also proffered the capitalization of income approach, which was rejected by the court upon objection of Seattle (R. Tr. 1627)).

The distinction is simply that the courts require the best type of evidence available be offered to assist the court in its effort to establish just compensation. In the case of a dam site such as that with which we are confronted, there is no recognized competent evidence available other than the informed estimate of those who are particularly versed in the field.

Certainly such an expert should not be disqualified because he has knowledge of facts which would not be admissible as direct evidence of the value of the property taken. To what extent the witness should be permitted to elaborate on those facts is another and less important issue. The PUD submits that the more well-seasoned cases would permit such expert to explain his opinion by freely expressing the elements that have influenced him heavily in formulating that opinion, particularly so as in the instant case where the trial is before the court without a jury. This enables the court to more fully appreciate the foundation upon which the opinion is based and to rely on it or discredit it accordingly. If the court finds that the witness has been influenced by unacceptable assumptions or data, the court may make the necessary adjustments in weighing the opinion, but such matters must necessarily in such cases go to the weight of the testimony, not to the admissibility. Otherwise, the condemnor need only cross examine until the witness admits that he has considered some fact or element that would not in itself be probative evidence (quite a simple matter), move to strike the opinion, and thus prevent any chance of the landowner receiving just compensation for the property.

The reasonableness of the above argument is aptly demonstrated by the character of Seattle's other grounds in support of its attack on PUD's Specification of Error No. 2. For example, Seattle complains that the witness, Vaughan, by consulting with another member of his appraisal firm who specialized in the

appraisal of mining property, in an effort to familiarize himself with the nature and value of a few small mining claims within the reservoir area " . . . was basing his opinion on facts and opinions not in evidence, a practice held improper by this court in *Standard Oil Co. v. Moore,* 251 F. 2d 188, 221 (1957)."

It is submitted that Seattle has erroneously reported the holding of the court in the cited case wherein this court in fact held:

> "Appellants also contend that the hypothetical question, as asked, omitted the recital of many fundamental facts which were in evidence, and assumed basic facts contrary to the uncontradicted record.
>
> " . . .
>
> "In general, it may be said that a hypothetical question should include any undisputed fact which is clearly material and important. The parties, however, are often not in agreement as to what facts are undisputed, material, and important. If it is objected that certain facts should be included, it is for the trial judge, in the exercise of his discretion, to determine whether the question should be reframed to add such facts. *Pasadena Research Laboratories v. United States,* 9 Cir., 169 F. 2d 375, 384, certiorari denied, 335 U.S. 853, 69 S.Ct. 83, 93 L. Ed. 401. (p. 220)
>
> " . . .
>
> "Opinion Testimony Based on Facts Not in Evidence. We have discussed above the contention that the hypothetical question asked of Dr. Burd was defective, in that it assumed facts not in evidence. Appellants also argue, quite apart from the

asserted improper form of the hypothetical question, that Dr. Burd should not have been permitted to premise his answer upon facts which were not in evidence, and many of which were based on hearsay.

"Dr. Burd testified that, in preparing himself to express an opinion as to market value, he made certain studies and gathered background information from a number of sources. He indicated the nature of these studies and the sources drawn upon. The information gained or findings arrived at in the course of this research were not revealed, however, nor were the source materials which Dr. Burd consulted offered in evidence. On at least one occasion, counsel for Moore sought to have Dr. Burd testify as to the information gained in these pretrial studies. Appellants' objection was sustained, the court instructing the witness: 'You can state if you consider things as a reason for this, but you cannot say what the things are as a factual basis.'

"It is common practice for a prospective witness, in preparing himself to express an expert opinion, to pursue pretrial studies and investigations of one kind or another. Frequently, the information so gained is hearsay or double hearsay, in so far as the trier of the facts is concerned. This, however, does not necessarily stand in the way of receiving such expert opinion in evidence. It is for the trial court to determine, in the exercise of its discretion, whether the expert's sources of information are sufficiently reliable to warrant reception of the opinion. If the court so finds, the opinion may be expressed. If the opinion is received, the court may, in its discretion, allow the expert to reveal to the jury the information gained during such investigations and studies. Wide latitude in cross-examination should be allowed." (pages 221, 222)

It is interesting to note that special counsel representing Seattle in the case at bar are members of a law firm which represented the appellant Standard Oil Co., in the cited case.

The reasoning of the above case is applicable to the objections of Seattle to the testimony of the witness, Vaughan. Seattle objects that an unidentified person wrote a Federal Power Commission publication to which the witness had referred for study and investigation and that the witness did not know the basis upon which that author allocated certain costs to power, storage, and other uses. It objects that the witness " . . . was hazy as to just what the relevant FPC account included . . ." and that the publication studied by the witness may have included some condemnation costs, court costs, and counsel fees under a subtitle of "Land and Land Rights." These were all matter which went properly to the weight of the opinion given by the witness, not to its competency.

In the *Twin City* cases the appraisal witness, Johnson, used the same approach as did Mr. Vaughan. It is shown on Johnson's Exhibit 40 (App. to PUD's opening brief p. 151) that he made use of the same FPC records as were used by Mr. Vaughan, The courts in the *Twin City* litigation found nothing wrong with this.

The fact is that the above objections formed no part of the trial court's basis for striking the value opin-

ions of the PUD's witnesses. Although the objections of Seattle's counsel were repeatedly directed toward various of those issues, the remarks of the Court gave no indication that it was in those areas that the court found the witnesses' testimony to be objectionable. Had an objection been sustained at the time of trial on any of the bases contended by Seattle, the PUD would at least have had an opportunity to correct the form of its evidence. On the contrary, however, the basis of the trial court's ruling seems best summed up in the court's ruling on the PUD's Motion to Reconsider wherein the Court said:

> "I thought that the valuation placed on the properties by the valuation witnesses presented by the PUD were not on a fundamentally correct basis. I felt that the only basis upon which the property could be valued was on the basis of comparables or opinion evidence based upon some comparable properties." (R. MTR)

It can be seen that the district court adhered to the proposition earlier announced that valuation witnesses are narrowly restricted to the three approaches, reproduction costs, capitalization of income, or comparable sales, and that the only pigeon hole available to PUD was the comparable sales approach regardless of the unique character of the property and the testimony of the PUD's value witnesses to the effect that they were unaware of any comparable sales (R. Tr. 1038 and 1339).

To support its contention that Mr. Vaughan appraised the properties as though the PUD had already acquired all necessary licenses and permits to construct its proposed project, Seattle quotes from context on cross-examination:

> " 'I have appraised this as a right to build an existing hydroelectric dam as planned . . . ' (RTR 1131-1132)" (Seattle's brief, p. 33).

In fact, the testimony continues:

> "I have appraised this as a right to build an existing hydroelectric dam as planned, and if now you are talking about an completely different location, I would have to consider the completely different location.
>
> "Q. Have you appraised it as a right to build or have you appraised the land on which to build?
>
> "A. The land on which to build which conveys the right to build.
>
> "G. Does the mere ownership of the land on which to build convey the right to build, in your thinking, Mr. Vaughan?
>
> "A. Not without approval of the Federal Power Commission and public agencies, of course."

It is abundantly clear from a reading of the entire testimony that the witness recognized the absence of a Federal Power Commission license. This is quite obviously one of the reasons why he valued the properties at $8,700,000 rather than at the above-quoted $34,000,000 figure. In the opinion of the witness, how-

ever, such deficiency would not prevent the properties from maintaining a substantial value for power site purposes. As he explained:

> "They owned the land upon which the dam would be built, the adjacent — they had the flow rights, the overflow rights, sufficient to cover the reservoir, to private lands and adjoining the federal land which would permit the rest of it, there was a need for the dam in that location.
>
> "There is no inherent right for anybody to build a dam; you have to get permits from the federal agencies; but I think it is reasonable to assume that if anyone owned these rights under these circumstances, when there was a need for additional power, that the regulatory bodies would not be capricious or would not refuse to grant the permit to a bona fide owner who was capable of utilizing the property." (R. Tr. 1143.)

This is a realistic viewpoint accepted by at least one court as stated in *Metropolitan Water District v. Adams,* 116 P. 2d 7, 21:

> "The fact that the realization of any of the water importation projects outlined by the engineers would depend upon the solution of problems which might arise in connection with the acquisition of water rights, lands, rights of way, easements, state or federal franchises, or other interests essential to consummation of the plans, did not render testimony too remote or speculative to merit consideration by the jury. Such uncertanties and difficulties are only those which confront every prospective purchaser of a site for terminal storage. They are commonly met and conquered in every present day large scale water project. If it were necessary to eliminate them before per-

> mitting the expression of an opinion of market value of a terminal storage site, it is safe to say that no value based upon adaptability of the land to that use could ever be reliably established. Given a sufficiently urgent public demand for additional water, an available supply for importation, and an economical and feasible plan for its transportation, there is certain to be forthcoming the necessary capital to finance the undertaking upon suitable terms, with all essential governmental sanctions, and power in the public agency managing the development to procure, by condemnation or otherwise, all necessary lands, easements, water rights, or rights of way. In short, the ordinary problems inherent in the development of property for terminal storage affect only the weight and not the admissibility of evidence attesting the potential demand for and adaptability of the site to such use under economically feasible conditions, and other proper elements of evaluation. *McCandless v. US.,* 56 S. Ct. 764, 80 L. Ed. 1205."

Seattle's contention that the witness considered the use of federal lands as part of PUD's property for valuation purposes is dispelled by a reading of the above-quoted testimony. The witness did not value the federal lands as PUD property. He valued the PUD lands in their realistic state — enhanced by their abuttment upon federal lands that had been set aside by the Secretary of Interior for use in conjunction with hydroelectric power projects. The propriety of such consideration by the witness is demonstrated by *U. S. v. Jaramillo,* 190 F. 2d 300, (10th Cir. 1951), wherein the federal government was itself condemning ranch lands that were adjoined by federal lands upon which public grazing of cattle had been permitted. The court states on page 302:

> "In determining the adaptability of the lands as a ranch, it was therefore proper to take into consideration the availablility and accessibility of the permit land as an appurtenant element of value for ranching purposes, provided that consideration is also given to the possibility that the permits could be withdrawn or cancelled by the Government at any time without constitutional obligation to pay compensation therefor. . . .
>
> "Like schools, roads, markets, water and other appurtenant elements of value, it was proper to take the available and accessible permit lands into consideration in arriving at just compensation for the fee lands taken, . . ."

In attempting to support the district court's ruling striking the conclusion of value expressed by PUD's witness, Courtney, Seattle, on pages 41 to 51 of its answering brief, discusses numerous matters, some of which might properly be considered in evaluating the weight to be given to Mr. Courtney's testimony. Here again, Seattle failed to discuss the grounds stated by the court as the basis for the ruling. In this ruling the court again stated its view that the only means of proving value in the case at bar was the comparable sale approach. In striking Mr. Courtney's conclusion of value, the court said:

> "I think that this testimony is not fundamentally sound, counsel, on the matter of value. It isn't a comparable sale approach, it isn't a capitalization approach, which you said was not to be used, or Mr. Ennis did. Of course, it can't be a reproduction cost approach.

> "I think there has to be some basis upon which an amount is determined, and to place it on the basis of taking a piece of raw land and theoreticllay selling the power becomes a pyramiding on nothing, on the raw land, and there is no plant there. I think this is testimony that cannot be used, as I view it, recognizing the tremendous qualifications of this man." (R. Tr. 1495-96.)

The district court was heedless of the admonition of the United States supreme court not "to make a fetish even of market value, since that may not be the best measure of value in some cases," (*United States v. Cors,* 337 U.S. 325-332) and PUD was thereby placed in an untenable position. It admittedly owned a power site of great value but could not prove it because other similar sites had not been bought and sold in the market.

Seattle criticizes Mr. Courtney because he considered that the developer of a power site owning the properties and rights of the PUD in the Z Canyon area of the river would run the water of the river through penstocks or intake structures in order to generate power. As a basis for the criticism, Seattle asserts on page 48 of its answering brief that PUD had no riparian rights because, in the State of Washington under the decision of *Eisenbach v. Hatfield,* 2 Wash. 236, 26 P. 539, riparian rights do not exist in navigable waters. Seattle incorrectly applies the *Eisenbach* decision. In that case the riparian owner owned only the uplands and the state still owned the shore lands between the boundary of the uplands and the navigable

waters proper. In the case at bar, PUD had fee title to both the uplands and the shore lands. Its predecessor in interest had acquired title to the shore lands in 1916 (Ex. P. 3) prior to the enactment in 1917 of a code in the State of Washington establishing appropriation rights and procedures. This code preserved existing rights (RCW 90.03.010).

Having acquired title to the shore lands, PUD became the owner of the riparian rights attached thereto. *Northern Pacific Railroad Company v. Slade Lumber Co.,* 61 Wash. 195, concerns a case where the owner of uplands acquired from the State of Washington the title to the adjoining tidelands. The Court pointed out that the acquisition from the State of the tidelands, which are equivalent to the shore lands in the case at bar, distinguished the case from *Eisenbach v. Hatfield,* 2 Wash. 236, supra, which had been cited in support of the proposition that the upland owner on navigable water had no riparian rights. The Court said on page 199:

> "In the absence of facts and conditions upon which the *Eisenbach* case was predicated, its doctrine ceases to be applicable, and on the facts now before us, respondent should be held to have a right of access to its wharf located on its own land and contiguous to the deep water, *and that the same is valuable property right.* In Muir v. Johnson, supra, we said:
>
> " 'As early as the case of Eisenbach v. Hatfield, 2 Wash. 236, 26 Pac. 539, 12 L.R.A. 632, this court held that the owner of uplands bordering on navig-

able waters as such had no riparian or littoral rights in such waters as would enable him to maintain an injunction from interference therewith. This holding was based on the ground that between the boundary of the upland and the navigable waters proper there were *shore lands* which belonged to the state *and to which* all riparian and littorial rights attached, and the state, *or its grantee after it conveyed the lands,* had the sole right to complain of obstructions placed between the lands and the navigable waters of the river, lake or other body of water upon which they bordered.'

"If the grantee of the state has the right to complain of such obstructions, it is apparent that the respondent, being such a grantee, has the right to complain in this action." (Emphasis supplied.)

Further authority that the owner of shore lands possesses the riparian rights is found in *Bilger v. State,* 63 Wash. 457, wherein the Court said at page 465:

"It follows, therefore, that such littoral and riparian rights as the respondents have in the waters of Lake Washington were acquired by them by virtue of the purchase of the shore lands made by them from the State of Washington."

See also *State v. Sturtevant,* 76 Wash. 158, wherein the Court said at page 164:

"That littoral and riparian rights attached to shore lands is recognized in *Bilger v. State* . . . "

On page 49 of its answering brief, Seattle cites CXLII. of the Session Laws of 1891 (p. 327) to support its statement that the PUD incorrectly stated on

page 53 of its opening brief:

> "that before enactment in 1917 of a code in Washington establishing appropriation rights and procedures, no appropriation was necessary to establish a right to build a dam on the Pend Oreille River."

On page 53 of its opening brief, PUD was commenting on the order creating perpetual rights issued in 1915 under Chapter 125 of the 1907 Session Laws and said:

> "This perpetual right was created prior to the adoption in 1917 of a code in the State of Washington establishing appropriation rights and procedures, and no other state grants were then necessary in connection with the erection and operation of a dam in the Pend Oreille River and the use of the waters thereof for water power purposes."

The 1891 law referred to by Seattle was specifically limited to the use of water for irrigation, mining, and manufacturing purposes. The later 1907 act specifically referred to "the erection, construction, maintenance or operation of water power plants, reservoirs, or works for impounding water for power purposes . . . "

In any event, Seattle's aforementioned complaint against Mr. Courtney's assumption that PUD or its purchaser would have the right to divert the water of the river through penstocks or intake structures is fully answered by the decision in *Metropolitan Water District v. Adams,* 116 P. 2d 7, quoted at pages 30-31, supra.

In addition to what it had to say about the methods used by PUD's witnesses in arriving at a value for power site purposes, Seattle says that in any event the subject is moot inasmuch as "PUD's case for power site value failed because of its failure to show reasonable probability of devoting property to reservoir use." (Seattle's answering brief, p. 57.) Seattle predicates this contention on Finding of Fact No. 11 (R. 88) that as to the Boundary project or High Z project a prospective developer "could probably not acquire" a few acres of privately owned land in the reservoir area "by voluntary transfer if it be assumed that such developer did not have the power of eminent domain." As to the Low Z project, this finding provides that a developer "could acquire the necessary properties by voluntary transfer even if it be assumed that such developer did not have the power of eminent domain."

As to the Boundary and High Z projects, it is Seattle's position that the finding that a developer might not be able to get deeds to this minor amount of private property in the reservoir area without threatening condemnation is tantamount to a finding that there was no reasonable probability that such a developer could utilize the Boundary site for a power plant or the Z Canyon site for a high dam power plant. It is submitted that the Finding of Fact as actually stated does not necessarily negate the reasonable probability aforementioned. Furthermore, it is important to note that the district court specifically did not from this

Finding of Fact conclude as a matter of law that the useability of the property for either a Boundary project or a High Z project could not be considered in arriving at just compensation. Of course, the finding in no way affects consideration of the use of the property for the Low Z project. In this connection, it is also interesting to note that Judge Jameson, in the Yellowtail case, made a substantial award based upon the use of the land for power site purposes even though he also found that:

> "The plaintiff has failed to show that as of July 15, 1958, or today, there was any reasonable prospect of the plaintiff tribe developing a single purpose power project, or that any private utility was interested in doing so." (App. p. 68.)

Seattle uses the reference to the possible inability to acquire a few tracts in the reservoir area for either a Boundary or High Z project voluntarily without threat of condemnation in an attempt to bring the case at bar within the rationale of *McGovern v. New York,* 229 U.S. 363; *New York v. Sage,* 239 U.S. 57; and *United States v. Powelson,* 319 U.S. 266. The cited cases, without exception, dealt with situations where a condemnee who owned but a small portion of the properties necessary for the construction of a hydroelectric or similar project was seeking to recover power site value or its equivalent, usually on the theory that such condemnee possessed a state-granted right of eminent domain and could have condemned all necessary remaining lands.

In *McGovern v. New York,* 229 U.S. 363, supra, the condemnee owned what was described merely as "part" of lands that were being condemned by the City of New York for use as a water reservoir. The different parcels of land were in "hundreds of titles" and there was apparently no showing that the condemnee possessed the power of eminent domain or, for that matter, that anyone except the city would have use for such reservoir. The court said at p. 372:

> "The enhanced value of the land as part of the Ashokan reservoir depends on the whole land necessary being devoted to that use. There are said to have been hundreds of titles to different parcels of that land. If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect upon the valuation."

New York v. Sage, 239 U.S. 57, supra, involved another condemnee owning properties in the same reservoir area under similar conditions.

In *United States v. Powelson,* 319 U.S. 266, the court was concerned with a four-dam hydroelectric project. Again there were several hundred tracts needed in addition to the lands owned by the condemnee. Although one of the proposed dams was to be located on the lands of the condemnee, that dam in itself was not contended to be profitable for power development. The condemnee relied on a state-granted right of eminent

domain to support his contention that the value of his property should be measured by the profit he would have realized if he had completed the project. The court stated at p. 285:

> "We hold only that profits, attributable to the enterprise which respondent hoped to launch, are inadmissible as evidence of the value of the lands which were taken . . . "

The various court of appeals cases cited by Seattle which interpret the *Powelson* case are all cases wherein the condemnee owned such an insignificant portion of the properties necessary to complete a feasible project that any evidence founded on a consideration of the contemplated project was a matter of pure speculation. The reasonable interpretation of those cases is that the condemnee's power of eminent domain cannot be relied upon to transform a speculative pipe dream into something such as the PUD owned and held in this case.

At the Z Canyon site the proposed dam, power house, and switch yard were all located upon lands and rights owned and held by PUD except that the east abuttment of the dam, to the limited extent that it would rise above the shore lands, would rest upon federal lands that had been set aside for power site purposes (Exs. D. 113, 114, 130a, 130b, 137, and 142; Exs. P. 80a and 80b.)

In the Yellowtail decision, Judge Jameson said:

> "As an additional reason why power site value should not be considered, the Government argues that the plaintiff does not own a sufficient portion of the site to accommodate the location of a power project. It is undisputed, however, that the dam, powerhouse and switchyard are all located on the lands acquired from plaintiff . . .
>
> " . . . A private purchaser of the Crow lands, interested in acquiring a dam site and building a dam equal to Yellowtail, presumably would be willing to pay dam site or water power value to the Crows for a dam impounding water over the entire area, less the cost of necessary acquisitions of non-Crow lands at their fair market value, which would not include water power value." (App. p. 57-59.)

Because of this essential ownership of the site, the necessity to acquire 10,778 acres of private lands and 2,486 acres of state lands in order to complete the project did not deter Judge Jameson from making a substantial award of just compensation for the taking of the power site.

Possible difficulties in acquiring additional lands necessary for completion of a project, even by condemnation if necessary, did not defeat the owner's right to just compensation in *McCandless v. United States,* 74 F. 2d 596 (9th Cir. 1935). In that case, the government was condemning a cattle ranch in Hawaii. Although the tracts of land being taken were non-irrigable in themselves, the condemnee also owned other tracts several miles distant upon which he had intended to construct an irrigation project which would permit him to pipe water to the tracts taken. The district court had excluded evidence on the cost of transporting

water to the land. In reversing that ruling, this court said at p. 601:

> "It appears from the evidence that in order to supply the land in question with a sufficient water supply for the cultivation of sugar cane the water would have to be conducted not only across public lands of the Territory but also across other land held in private ownership. It may be assumed that such a right of way may be acquired over private lands by condemnation if necessary by means of a corporation organized for such a purpose. 48 USCA Sec. 562; Rev. Laws Hawaii 1925, Secs. 828, 829."

Although the above case was not appealed squarely on that issue, it was necessary for the United States supreme court to pass upon that issue in reviewing the case. In that regard the court said:

> "That the greater part of the land here sought to be condemned was adapted to the successful growth of sugar cane if provided with sufficient water for irrigation is not controverted. Proof that a supply of water was available and might be brought to the land at an expense consistent with its profitable use was, therefore, relevant and material. And this the evidence offered tended to establish. The ruling of the trial court rejecting the offers, and its instruction to the jury to disregard the possibility of bringing water from lands other than the land sought to be condemned and the 284-acre tract adjoining, were erroneous. This is well pointed out by the court below, and we see no occasion to enlarge upon its opinion." (*McCandless v. United States,* 298 U.S. 342, at p. 345-346.)

That this distinction was recognized by the United States supreme court when it decided the *Powelson*

case is clear from the fact that the court cited *McCandless v. United States,* supra, with approval at p. 275, the beginning of its legal treatise on the issue.

SEVERANCE

Seattle attempts to dodge the severance issue. To meet the PUD's contention that the court erred in the pretrial order forbidding the PUD even to present evidence to show whether the court should award severance damages, it tries to divert attention to facts and agreements that have no relation to PUD's claim for severance damage.

First, it attempted to cloud the issue by relating the claim of severance damage to the uplands at the Z Canyon site remaining after the taking of the balance of said uplands. The record is completely clear that the severance claim was not related to the remaining uplands at the Z Canyon site.

Second, Seattle further attempts to confuse the issue by relating the claim for severance damage to PUD's claim that the taking sought by Seattle included a partial taking of its Box Canyon project which would result from the raising of the water in the tailrace of the Box Canyon dam as a result of the impoundment of water by the Boundary dam. This claim was set out as a part of PUD's contention No. III. in the pretrial order (R. 44). After seeking to so identify the severance claim, Seattle

then calls attention to the post-trial agreement by the terms of which the parties settled this matter of encroachment on the Box Canyon project by the Boundary reservoir.

It is perfectly clear that the PUD's claim of severance damage was not related to the foregoing claim that was settled. PUD's claim of severance damage was separately stated as a distinct claim in its contention No. IV. set out in the pretrial order (R. 45).

The balance of Seattle's brief on the subject of severance is based on the argument that the license gives Seattle the right to build the Boundary dam, and that since the PUD now can't build a dam at Z Canyon, it has no right to severance damages (Seattle's answering brief pp. 53 to 57).

Seattle would have the court forget or entirely disregard the evidence of how Seattle induced the PUD to withhold filing a renewal of the Cooper application for a license to construct a power plant at Z Canyon. The Cooper application had been denied without prejudice (R. 34). Seattle induced the PUD to withhold its application while Seattle carried forward its investigation of the Boundary site under a preliminary permit for three years, preparatory to filing its application for that site. This dates back to October, 1953 (Exs. D. 119, 120; R. Tr. 337, 345, 346). A brief review of how Seattle brought this about become appropriate at this point.

In the letter of October 28, 1953, to the PUD, while the PUD was engaged in building Box Canyon dam on the Pend Oreille River, Seattle stated it had filed an application for a preliminary permit to study the Z Canyon-Boundary stretch of the Pend Oreille River (Ex. D. 119). At that time, the PUD had already secured its land and rights on both sides of the Pend Oreille River from the Boundary dam site upstream to the Box Canyon dam. As had been previously pointed out, these lands and rights constituted the essential and indispensable private lands and rights needed for a power dam at either the Boundary or Z Canyon sites. Additional necessary uplands had been withdrawn by the government for power site purposes.

When the Manager of Seattle City Light wrote the letter to the PUD requesting a conference to work out some agreement with reference to this stretch of the river, Seattle had no rights or ownership of any kind. Nevertheless, the PUD accepted the invitation, and representatives of the parties held their first meeting in Spokane, in February, 1954 (R. tr. 337).

When a series of conferences failed to reach any agreement, the PUD pased Resolution No. 328 (Ex. D. 122) dated June 11, 1954, directing its Manager to renew the application for the construction of the Z Canyon project. The PUD purchased the properties being condemned as an addition to its electric system so that, with a project at Z Canyon, it could firm

up production of power at Box Canyon during the flood season when the Box Canyon plant would be down (R. 35; R. Tr. 447.8).

Before filing the application, the PUD Manager, at a conference of the representatives of the parties in Seattle on August 24, 1954, explained the action of the PUD Commissioners and his intention to file the application (R. 465-6). Dr. Paul Raver, Superintendent of Seattle City Light, then called in a stenographer and dictated what was termed the Memorandum of Intent by which the parties declared their purpose to construct a power plant in the Z Canyon-Boundary stretch of the river as a joint venture on a 50-50 basis (R. Tr. 446-7; Ex. D. 123). As a result, the PUD withheld filing its application. It did so despite the fact that at that time the dam site at Z Canyon was partially developed. Cooper's engineers had sunk a 200 foot deep shaft beside the river at the bottom of the narrow deep canyon, tunneled underneath the river to the other side and diamond drilled holes upward into the rock in all directions. Thus the dam site's foundation had been proven to be solid rock. Plans for both a low dam and a high dam bringing the Cooper plans up to date were ready to be filed. All that was needed was to renew the application for a power plant to be operated in coordination with the Box Canyon project. Nevertheless, the PUD withheld action. Why? In order to permit Seattle to secure its Preliminary Permit, the grant of

which had not yet been announced, and investigate the Bounadry site as a possible alternate site to be built upon by the parties jointly.

In pursuance of the plans and purposes set out in the declarations of the Memorandum of Intent, the parties negotiated a 50 year contract in 1956 by the terms of which Seattle purchases power produced by PUD at its Box Canyon project. When the City Council of Seattle offically ratified that contract, which in its preamble clauses recognized PUD's ownership on the Pend Oreille River, its plans to develop a project at Z Canyon, and the intentions of PUD and Seattle to negotiate concerning plans and systems of additions, betterments, and extensions of their respective systems (R. 38), it renewed the District's confidence that Seattle was acting in good faith.

Believing in Seattle's good faith, the PUD officially approved the Memorandum of Intent by Resolution No. 362 (Ex. D. 124).

Another development during the four-year period of negotiations came when the question of the legality of a joint venture to build and operate a dam and power plant in the Z Canyon-Boundary stretch of the Pend Oreille River was posed. At that time PUD passed Resolution No. 419 (Ex. D. 126) directing its manager to join with Seattle in securing state legislation that would remove the question. In accordance therewith, PUD's manager thereupon induced the

Senator from the District embracing Pend Oreille County to introduce a bill to legalize such a joint venture. The manager of the PUD appeared before the Legislative Committee in charge of the bill and testified in its behalf (R. Tr. 948). The bill became a law in 1957.

When Seattle had completed its investigation and report of the Boundary dam site, it proceeded to file its application, unilaterally (Ex. P. 9). Seattle did this in complete disregard of all its past pledges and activities by which it had won and held the confidence of the PUD that it would build the dam in the Z Canyon-Boundary stretch of the river as a joint venture. After a long contest before the FPC and later the United States Court of Appeals for the District of Columbia, Seattle secured a license for the construction of the Boundary dam. It now asks the court to bury its dead deeds beyond legal memory. It is now engaged in this suit to condemn all of the properties of the PUD on the Pend Oreille River needed for its dam and reservoir at the Boundary site.

Despite all this record of misleading the PUD into believing in its good faith in plans to enter into a joint venture to construct the contemplated hydroelectric project in the Z Canyon stretch of the river, Seattle now has the brazen effrontery and cold cynicism to conclude its summary of events at the end of page 53 of its answering brief as follows:

> "Clearly it was this order of the FPC and not the taking of the PUD's properties which prevented the District from constructing the Z Canyon project and integrating its operation with Box Canyon."

By this statement Seattle admits that PUD has been prevented from constructing its Z Canyon project and integrating its operation with the Box Canyon project. This is the fact that gives rise to PUD's claim for severance damage. Seattle says it is not responsible for what PUD has lost. It says the FPC, in granting a license which Seattle had asked and fought for, is the culprit.

Counsel for the PUD is unable to find words proper to be used in a legal brief to describe adequately in condemnatory language the treatment which Seattle has imposed upon the PUD by which it has destroyed its highly valuable opportunity and plans for the coordination of two power plants at Box Canyon and Z Canyon.

The foregoing emphasizes the justice of an order by this court to admit a complete presentation of the evidence of the plans and uses the PUD intended to make of a power plant at Z Canyon by coordination of its operation with the operation of the Box Canyon plant, and, if severance damages should be allowed, to fix the amount of such damages which should be awarded.

In attempting to support the district court's pretrial order forbidding the PUD even to present any evidence to enable the court to determine whether the PUD should be awarded severance damages, Seattle cites the opinions of federal courts, especially in connection with the *Grand River Dam Authority* case in both the supreme and appellate courts (175 F. Supp. 153-57, and 363 U.S. 229, 233). In that case, the court of claims denied severance damages, saying damages were "indirect and consequential." In this situation, as in every case where a court's opinion is cited as a precedent for the ruling contended for, the facts must be examined to learn if they are even similar to the facts in the case at bar. The facts in these cases are so widely different that the opinions cannot be considered applicable.

In the first place, that case involved a contest between the United States and the state government Authority of Oklahoma. The controlling fact in that case was that the doctrine of dominant servitude applied. Congress had passed the Flood Control Act (55 Stat. 638, 645) directing the federal government to construct dams on the Arkansas and Grand Rivers. That freed the federal government from paying damages for property taken for the construction of those projects.

In the second place, the upstream dams on the non-navigable Grand River would not have contributed anything to the operation and production of power by the dam of the Authority which it had been licensed

to build on the Arkansas River at Pensacola before Congress passed the Flood Control Act. In the case at bar, the dam as planned at Z Canyon was to supply power to the PUD when the flood waters of the Pend Oreille River destroyed or reduced production at Box Canyon. Box Canyon is not merely planned. It is built and in operation. When the high water destroys or reduces production there, the PUD must purchase power to supply its customers including the power to be furnished Seattle under the 50 year contract. The district court's pretrial order prevented the PUD from presenting the evidence which would show that the project at Z Canyon, because of the unusual topography of the river canyon, would produce sufficient additional power during the period of flood flow not only to firm up the Box Canyon's lack of production, but to do that without interfering with the amount of its regular production of power at other periods. These facts are highly important in considering the severance question.

The third difference is that the Dam Authority had only made surveys. It had no dam in operation. It had not tested the dam foundations of the upriver dam sites, nor had plans been prepared for the construction of the projects already on file with the FPC, as is the situation with the PUD as to Z Canyon. The Coordination Agreement covering all the principal projects of the Northwest, including the Z Canyon when developed, now exists. Also, the Intertie trans-

mission lines to the tremendous and, in fact, almost unlimited market for all surplus power in the Northwest are not only authorized by Congress to be built, but are now being constructed and will be in operation by the time the Z Canyon dam could be built. Thus the market which the FPC required for renewal of the Z Canyon application will have become available.

These facts constitute evidence which the trial court should admit and consider in determining whether severance damages should be awarded, and if so, the severance value to the PUD of the properties being taken by Seattle.

One other fact is emphasized by Seattle's citations from the *Grand River Dam Authority* case, namely, the trial court had admitted the evidence in order that the court in that case might determine whether severance damages should be awarded.

Seattle refers to the opinion of the Court of Appeals for the District of Columbia in which it affirmed the FPC's grant of license to Seattle (26 FPC 65). That opinion declared the Z Canyon's property was not a part of the PUD's "electric system" protected by the state law which forbids the taking of any part of the electric system of one municipal corporation by another municipal corporation. The added statement that "even if in this situation it were effective . . . it would not prevent Seattle from con-

demning the needed land," shows that the court was not passing on the questions of severance. The Court of Appeals' decision had nothing whatever to do with severance.

The simple fact is that at the pretrial hearing the district court ruled out PUD's contention that it should be entitled to offer proof of severance damage by saying:

> "I think, in this instance, there being no dam at Z Canyon, that if the rule of severance were to apply to the situation that we have here, it would be extending it unduly. I think there would be severance if Z Canyon were constructed and in operation in coordination with Box Canyon, but at this time that is merely a prospective use.
>
> "I feel, gentlemen, that there should not be submitted to the jury any question of severance damages, and I will hold that the rule of severance damages do not apply." (R. HPO 133.)

This ruling was premature and directly contrary to the holding in *West Virginia Pulp & Paper Co. v. United States,* 200 F. 2d 100 (4th Cir. 1952), to the effect that the rule of severance damage is applicable when a portion of properties, all of which have been acquired and integrated by plans for a particular use, are taken even though the portion so taken has not in fact been actually devoted to the planned use.

Seattle's answering brief emphasizes the validity of the conclusions set out on pages 73 to 75 of PUD's opening brief. PUD is entitled to the relief as sought.

PART II.

ANSWER TO OPENING BRIEF OF SEATTLE AS APPELLANT

Seattle's cross-appeal is premised on the contention that as the holder of a license from the FPC to construct a power project on the Pend Oreille River and under Sec. 21 of the Federal Power Act (16 USC 814) it has been cloaked with the constitutional and dominant power held by the United States Government to control and regulate navigable water in the interest of commerce. As a result thereof, Seattle says it enjoys:

1. The privilege to appropriate for its own use *without compensation* all of the shore lands owned by PUD, all of the rights held by PUD under Chapter 125 of the 1907 laws of Washington more fully above described, and all water rights and/or riparian rights held by PUD to the extent that they exist or attach below the line of ordinary high water of the Pend Oreille River; and

2. The right to condemn and take by eminent domain the uplands owned by PUD without considering their value as a site for hydroelectric power operations in determining just compensation.

It will not be disputed that the supreme court has determined that the United States enjoys the foregoing rights. There is no merit or real substance to

Seattle's argument as it is completely clear that it does not possess the government's power of dominant servitude mentioned above, nor is it entitled to any benefits that might flow therefrom or attach by reason thereof.

The thrust of Seattle's argument is that Section 21 of the Federal Power Act "confers federal eminent domain powers on licensees" and that "Congress delegated in Section 21 the full measure of its federal eminent domain powers." Even if these statements were correct, they in no way support the conclusion that as a result thereof Seattle possesses the government's power or privilege of dominant servitude. The United States does not appropriate lands or rights below the line of ordinary high water or the power value of abutting fast lands on a navigable river without compensation by exercising "federal eminent domain powers." The power of eminent domain, either federal or state, is used when property is taken for just compensation.

> "Eminent domain is generally defined as the power of the nation or a sovereign state to take, or to authorize the taking of, private property for a public use without the owner's consent, conditioned upon the payment of just compensation." (26 Am. Jur. 2d, Eminent Domain, Sec. 1, p. 638.)

When the United States displaces competing interests and appropriates without compensation the flow of a navigable stream for the improvement or protec-

tion of navigation, it does not do so by virtue of any federal eminent domain power; it does it by virtue of its power under the Commerce Clause of the constitution. *United States v. Commodore Park, Inc.,* 324 U.S. 386; *United States v. Twin City Power Co.,* 350 U.S. 222.

Section 21 of the Federal Power Act provides that a licensee may acquire:

> ". . . *an unimproved dam site* or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or works appurtenant or accessory thereto . . . by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located . . . Provided, that the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3000.00." (Emphasis supplied.)

It is well established that the right of an inferior body to exercise the right of eminent domain is limited by the statute in which it is granted.

> ". . . The right of eminent domain, inherent in the Government of the United States, differs from that power delegated to inferior bodies in that such bodies are limited in the exercise of the power by a strict construction of the legislative grant, while the sovereign power is hedged about by no such limitations." (18 Am. Jur. Sec. 17, p. 644.)

The limitation of the jurisdiction of the United States district courts to actions where the owner's claim exceeds $3000 in itself clearly negatives any thought that congress was extending to licensees the sovereign right to appropriate any of the properties described *without compensation.* Also, the use of the words "unimproved dam site" in Section 21 is significant. When the United States is exercising the right of eminent domain with reference to the abutting fast lands on a navigable stream, there is no such thing as an "unimproved dam site." The existence of the flow of the stream is necessary before any given property may be described as an "unimproved dam site." The government's dominant servitude over that flow precludes the ownership of an unimproved dam site as against the United States. The use of these words in the statute describing what a licensee may condemn demonstrates that congress did not endow licensees with the government's dominant servitude and intended that licensees should pay just compensation for dam sites as such.

Seattle's argument that the Federal Power Act grants it the right to take or damage PUD properties or rights below the line of ordinary high water without compensation ignores Section 10(c) of that Act (16 USC 803(c)) which specifically provides:

> "Each licensee hereunder shall be liable for *all damages* occasioned to the property of others by the construction, maintenance, or operation of the project works or of the works appurtenant or ac-

cessory thereto, constructed under the license, and in no event shall the United States be liable therefor." (Emphasis supplied.)

In considering the rights and status of Seattle under the Federal Power Act, further reference to the factual situation is important. As pointed out earlier in this brief at pages 33-35, the owner of shore lands on a navigable stream in Washington holds riparian and littoral rights. It was pointed out in *DeRuwe v. Morrison,* 28 Wn. 2d 797 at page 805, that the primary rights of a riparian owner include the right *"to such use of the water* as it flows past his land as he can make without materially interfering with the common right of other riparian owners" and the right "to whatever the water produces, such as ice." (Emphasis supplied.)

Prior to the passage of the Washington State water code in 1917, which preserved existing rights, there were only two riparian owners of shore lands in the area on the Pend Oreille River commencing at the Boundary site near the Canadian border and running southerly upstream to a point far upstream from the present location of PUD's Box Canyon dam. These were Hugh L. Cooper, PUD's predecessor in interest, who owned fee title to the shore lands running from the Boundary site upstream through the Z Canyon up to Lime Creek, and the State of Washington, which owned the shore lands upstream from Lime Creek past the Box Canyon. (Exs. P. 1, 2; D. 109.)

Thus, Cooper had the riparian right in the area where he owned fee title to shore lands to use the water without materially interfering with the common riparian right of the State of Washington, the only other owner of shore lands on this stretch of the river holding riparian and littoral rights. To eliminate any charge of interference, the only right Cooper needed from the upstream riparian owner of shore lands (the State) was the perpetual right to back and hold the water of the river upon and over said state-owned riparian shore lands. This he acquired in 1915 under the authority of Chapter 125 of the 1907 session laws (Ex. P. 1).

PUD acquired everything Cooper owned. One of the conveyances from the Cooper heir to PUD (Ex. P. 8) specifically includes "Any and all water rights . . . of any and every kind or character upon or along the Pend Oreille River . . ."

As far as the State of Washington is concerned, Cooper and his successor, PUD, had the perpetual usufructurary right in the Boundary-Z Canyon area of the Pend Oreille River to use the water in that river for the generation of power. Seattle would construe the Federal Power Act as abolishing these state-recognized rights to use the water when it says that Act grants to licensees the government's power of dominant servitude over navigable streams. This power of dominant servitude was recognized long before the enactment of the Federal Power Act, and had congress

intended that licensees would be vested with power to appropriate anything without compensation, it would have been a simple matter to so provide. To the contrary, Section 27 of the Federal Power Act, Title 16 USCA, Section 821, provides as follows:

> "Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Seattle's immodest claim that, as a licensee under the Federal Power Act, it stands in the shoes of the United States and thereby holds the sovereign's dominant servitude over the flow of the Pend Oreille River is shown to be imaginary by the supreme court decision in *Federal Power Commission v. Niagara Mohawk Power Corp.,* 347 U.S. 239. This decision analyzes the Federal Power Act and defeats Seattle's cross-appeal. This is shown by the following quotations with emphasis supplied:

> "The most significant issue raised by this case is whether the Federal Water Power Act of 1920 has abolished private proprietary rights, existing under state law, to use water of a navigable stream for power purposes. We agree with the Court of Appeals that it has not." (pp. 240, 241.)

> "We are not required to determine the nature of the rights claimed by respondent except to recognize that they are usufructuary rights to use the water for the generation of power." (p. 246.)

"We conclude, as did the Court of Appeals, that, even though respondent's water rights are of a kind that is within the scope of the Government's dominant servitude, the Government has not exercised its power to abolish them.

"While we recognize the dominant servitude, in favor of the United States, under which private persons hold physical properties obstructing navigable waters of the United States and all rights to use the waters of those streams, we recognize also that the exercise of that servitude, without making allowances for preexisting rights under state law, requires clear authorization. A classic example of such a clear authorization appears in *United States v. Chandler-Dunbar Co.,* 229 U.S. 53. The Act of March 3, 1909, there authorized the exercise of the dominant right of the United States to take all of a navigable river's flow for purposes of interstate commerce. It did so in explicit terms. It said:

> " 'Sec. 11 . . . the ownership in fee simple absolute by the United States of all lands and property of every kind and description north of the present Saint Marys Falls Ship Canal throughout its entire length and lying between said ship canal and the international boundary line at Sault Sainte Marie, in the State of Michigan, is necessary for the purposes of navigation of said waters and the waters connected therewith.
>
> " 'The Secretary of War is hereby directed to take proceedings immediately for the acquisition by condemnation or otherwise of all said lands and property of every kind and description, in fee simple absolute . . .

. . .

> " 'Every permit, license, or authority of every kind, nature, and description heretofore issued or granted by the United States, or any official thereof, to the Chandler-Dunbar Water Power Company . . . shall cease and determine and become null and void on January first, nineteen hundred and eleven . . .' 35 Stat. 820, 821.

"In that case the Government took the entire flow of the stream exclusively for purposes of interstate commerce. The Court recognized the Government's absolute right, within the bed of the stream, to use all of the waters flowing in the stream, for purposes of interstate commerce, without compensating anyone for the use of those waters.

"That decision is not applicable here. The issue here is whether the much more general and regulatory language of the Federal Water Power Act shall be given the same drastic effect as was required there by the language of the Act of March 3, 1909. We find nothing in the Federal Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. Unlike the statute in the *Chandler-Dunbar* case, the Federal Water Power Act mentions no specific properties. It makes no express assertion of the paramount right of the Government to use the flow of the Niagara or of any other navigable stream to the exclusion of existing users. On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties.

"The Act—

" 'discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation and a determination to avoid unconstitutional invasion of the jurisdiction of the States . . .

" 'The Act leaves to the States their traditional jurisdiction subject to the admittedly superior right of the Federal Government, through Congress, to regulate interstate and foreign commerce . . .' *First Iowa Cooperative v. Federal Power Commission,* 328 U.S. 152, 171.

"The Act treats usufructuary water rights like other property rights. While leaving the way open for the exercise of the federal servitude and of federal rights of purchase or condemnation, there is no purpose expressed to seize, abolish or eliminate water rights without compensation merely by force of the Act itself.

"The reference in the Act to pre-existing water rights carry a natural implication that those rights are to survive, at least until taken over by purchase or otherwise. Riparian water rights, like other real property rights, are determined by state law. Title to them is acquired in conformity with that law. The Federal Water Power Act merely imposes upon their owners the additional obligation of using them in compliance with that Act.

"The legislative history of the Act discloses no substantial support for the drastic policy which the commission seeks to read into it. To convert this Act from a regulatory Act to one automatically abolishing pre-existing water rights on a na-

tionwide scale calls for a convincing explanation of that purpose. We find none. In fact, the legislative history points the other way. Representative William L. LaFollette, of Washington, a member of the House Special Committee on Water Power which reported substantially the same bill as that which in 1920 became the Federal Water Power Act, said of it in 1918:

> " 'This bill is not based on either the Government's ownership or its sovereign authority, but on the hypothesis that we as representatives of the States have authority to act for the States in matters of this character and pass laws for the general good, by the establishment of a limited trusteeship or commission composed of officials of the Government, to carry out and administer this law in such a way as not to infringe any of the rights of the States nor to impede or restrict navigation, but rather to benefit it . . . Under this bill we only allow the commission a supervisory power over those functions entirely within the State's jurisdiction for the period covered by any license, the State having exercised its rights in advance of issue.' 56 Cong. Rec. 9110.

"Shortly thereafter he added:

> " 'If we put in this language (of Sec. 9(b)), which is practically taken from that Supreme Court decision (*United States v. Cress,* 243 U.S. 316), as to the property rights of the States as to the bed and the banks and to the diversion of the water, then it is sure that we have not infringed any of the rights of the States in that respect, or any of their rules of property
>
> . . . We are earnestly trying not to infringe the rights of the States.' *Id.,* at 9810.

"In 1930, this Court passed upon the basic question now before us when it came here in a different connection. In Ford & Son v. Little Falls Co., 280 U.S. 369, Mr. Justice Stone, writing for a unanimous Court, held that a riparian owner of a right to use water for power purposes in the navigable Mohawk River, in New York State, was entitled to an injunction against the uncompensated destruction of that right by a subsequent licensee under the Federal Water Power Act. The New York Supreme Court had granted such an injunction and awarded damages. This Court affirmed that decision, although the federal license then before the Court had authorized the licensee to raise the navigable waters of the Hudson River to such an extent that they would destroy the value of the riparian owner's right, under state law, to use the fall of tributary waters of the Mohawk for power purposes. It was thus held that the Federal Water Power Act had not abolished the complaintant's private proprietary water rights, existing under New York law, to use navigable waters for power purposes.

> "'(E)ven though the rights which the respondents (the riparian owners) here assert be deemed subordinate to the power of the national government to control navigation, the present legislation does not purport to authorize a licensee of the Commission to impair such rights recognized by state law without compensation.' *Id.*, at 377.

"After quoting from Secs. 10(c) (liability for damages caused by the licensed project), 27 (saving clause as to proprietary rights under state law), 21 (condemnation rights) and 6 (licensee's acceptance of the conditions of the Act), the Court added:

" 'While these sections are consistent with the recognition that state laws affecting the distribution or use of water in navigable waters and the rights derived from those laws may be subordinate to the power of the national government to regulate commerce upon them, they nevertheless so restrict the operation of the entire act that the powers conferred by it on the Commission do not extend to the impairment of the operation of those laws or to the extinguishment of rights acquired under them without remuneration. We think the interest here asserted by the respondents, so far as the laws of the state are concerned, is a vested right acquired under those laws and so is one expressly saved by Sec. 27 from destruction or appropriation by licensees without compensation, and that it is one which petitioner (the licensee), by acceptance of the license under the provisions of Sec. 6, must be deemed to have agreed to recognize and protect.' *Id.,* at 378-379.

"Parallel reasoning has been applied in a case involving a conflict between a licensee and the holder of state-recognized rights to use water from a navigable stream for irrigation purposes. *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 734. See also, as to state-created water rights for power purposes, *Grand River Dam Authority v. Grand-Hydro,* 335 U.S. 359, 372; *Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co.,* 99 F. 2d 902; *United States v. Central Stockholders' Corp.,* 52 F. 2d 322; *Rank v. Krug,* 90 F. Supp. 773, 793; *Great Northern R. Co., v. Washington Electric Co.,* 197 Wash. 627, 86 P. 2d 208.

"In *First Iowa Cooperative v. Federal Power Commission,* 328 U.S. 152, at 175-176, Sec. 27 of the Act was discussed in relation to conditions controlling the approval of projects. *The lang-*

> *uage there used is applicable to proprietary water rights for power purposes as well as those for other proprietary uses.* To any extent that statements in *Alabama Power Co. v. Gulf Power Co.,* 283 F. 606, cited in the First Iowa case, indicate a different interpretation, they are not controlling." (pp. 248-256.)

It will be noted in the quotation above that the United States supreme court found the 1909 Act with which the court was concerned in the Chandler-Dunbar case to be very much unlike the Federal Water Power Act. This belies the statement on page 74 of Seattle's opening brief as appellant that the two acts are similar.

On page 70 of its aforementioned brief, Seattle cites *Alabama Power Co. v. Gulf Power Co.,* 283 F. 606, calling attention that the decision was cited with approval in *First Iowa Hydro-electric Coop. v. Federal Power Commission,* 328 U.S. 152 at 176. The *Alabama Power Co.* case was cited in the *First Iowa* case in support of a statement that, "The effect of Section 27 in protecting state laws from supersedure, is limited to laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature." In this connection it should be noted in the quotations from the *Niagara Mohawk Corp.* case, supra, that the supreme court, when referring to Section 27 of the Federal Power Act and the *First Iowa* decision, said:

> "The language there used is applicable to *proprietary water rights for power purposes* as well as those for other proprietary uses. To any extent that statements in Alabama Power Co. v. Gulf Power Co., 283 F. 606, cited in the First Iowa case, indicate a different interpretation, they are not controlling." (Emphasis supplied.)

In *Great Northern Railway Co. v. Washington Electric Co.,* 197 Wash. 627, cited with approval in the *Niagara Mohawk Power Corp.* case above, it appears the Great Northern Railway Company, under an arrangement with the State of Washington, was occupying with a track embankment certain state-owned shore lands and stream bed below the line of ordinary high water on the Columbia River, a navigable stream. Although the railway company held only a right of occupancy from the state, in contrast to legal title held by PUD in the case at bar, the court concluded that the railway company had a property right in the embankment. This property of the railway company was damaged by the actions of the holder of a license issued under the Federal Power Act. The identical contention was made as is herein made by Seattle that the licensee was not liable for damage to property below the line of ordinary high water because the licensee possessed the government's right of dominant servitude over the flow of the stream. In rejecting this contention and holding the licensee liable, the Washington supreme court said at page 641:

> "But, from the fact that all damage done to structures in navigable waters belonging to private parties is *damnum absque injuria,* when the United States acts directly in improving navigation, it does not follow that the same rule applies when it improves navigation through the medium of a licensee. *The licensee in such a case gets no part of the sovereign power over navigable waters which belongs to the Federal government. He gets only those powers which are specifically granted in the license, and no more, and they are not only subject to strict construction, but also to definite limitations prescribed by the water power statute.*" (Emphasis supplied.)

In *United States v. Twin City Power Co.,* 350 U.S. 222, at page 225, it is said:

> "The legislative history and construction of particular enactments may lead to the conclusion that Congress exercised less than its constitutional power, fell short of appropriating the flow of the river to the public domain, and provided that private rights existing under state law should be compensable or otherwise recognized. Such were *United States v. Gerlach Live Stock Co.,* supra, and *Federal Power Commission v. Niagara Mohawk Power Corp., supra.* We have a different situation here, one where the United States displaces all competing interests and appropriates the entire flow of the river for the declared public purpose."

Seattle has clearly demonstrated its own lack of confidence in its claim that its license and Section 21 of the Federal Power Act has endowed it with the sovereign's dominant servitude over the flow of the Pend Oreille River. It included in its condemnation

complaint herein all lands and rights of PUD lying below the line of ordinary high water and prayed that just compensation be fixed and awarded for the taking of said properties. It introduced evidence on its theory of the value of said properties and rights. Also, after its complaint was filed, it obtained orders from the Department of Conservation and Department of Natural Resources of the State of Washington authorizing the diversion, storing, and backing up of the river waters (Exs. P. 20, 21). None of this would have been necessary if Seattle in fact enjoyed the power of dominant servitude over this stream. It should be noted that the aforementioned order (Ex. P. 20) is specifically made subject to the right granted in 1916 to PUD's predecessor, Hugh L. Cooper, and the order (Ex. P. 21) is issued "subject to existing rights."

The municipality of Seattle is capable of many things as the history of its callous treatment of the PUD so graphically demonstrates. It is respectfully submitted, however, that Seattle has not yet reached that stage of sovereignty that will enable it to strip the PUD or anyone else of property without the payment of "just" compensation.

As was so aptly said in *United States v. Commodities Corp.,* 339 U.S. 121, at page 124:

> "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity'."

That is what PUD asks.

Respectfully submitted,

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ENNIS AND KLOBUCHER

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Appellant-Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CLARENCE C. DILL

ENNIS AND KLOBUCHER

By .....

WILLIAM G. ENNIS, of counsel
for Public Utility District No. 1
Appellant-Appellee

APPENDIX

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE DISTRICT OF MONTANA

BILLINGS DIVISION

FILED
Jul. 19, 1961 — Dean O. Wood, Clerk
By Mary C. Tuttle, Deputy

THE CROW TRIBE OF INDIANS OF MONTANA, *Plaintiff*,
v.
THE UNITED STATES OF AMERICA, *Defendant*.

Civil No. 214

MEMORANDUM

Memoranda were submitted by counsel for the respective parties on specific questions raised at the pretrial conference held September 1, 1959. These questions will be considered in order in this memorandum opinion.

QUESTION 1.

> Whether by Reason of Public Law 85-523, the Court Should Modify Its Views With Respect to the Inclusion of Water Power or Dam Site Value in Determining Just Compensation, as Set Forth in the Court's Opinion in *United States v.* 5,677.94 *Acres of Land, etc.,* 162 F. Supp. 108.

Defendant contends that the $2,500,000 granted plaintiff under Public Law 85-523 constitutes payment

in full for any "special value" the lands in question "might have because of the language contained in the Allotment Act and because of their adaptability for power site purposes," and that additional payment would be made only in the event it is determined by the court that "just compensation" is more than $2,500,000. Relying upon *United States v. Twin City Power Company,* 1956, 350 U.S. 222, 76 S. Ct. 259, 100 L. Ed. 240, defendant argues that if the Big Horn River is determined to be navigable, then water power value may not be considered in determining "just compensation."

This court of course held in the condemnation action that by reason of the provisions of the Crow Allotment Act water power value may be considered as a part of "just compensation." If that conclusion is erroneous, then obviously any right of recovery for any additional sum would depend upon whether the Big Horn River is navigable.

I find nothing in Public Law 85-523 or its legislative history, however, to indicate a congressional intent that the appropriation of $2,500,000 should cover "special value for power site purposes" in full and that the court should exclude water power value in its award of "just compensation." On the contrary, it seems clear that Congress intended to leave to the courts the question of determining whether water power value should be considered in awarding just

compensation. The concluding sentence of the Act reads:

> "Nothing contained in this joint resolution shall be taken as an admission on the part of the United States that just compensation is required for any particular element of value, including power site and dam site value, now or hereafter claimed by the Crow Tribe, *but the same shall be determined in accordance with the Constitution and laws of the United States.*" (Emphasis added.)

The conference report on S. J. Res. 12 reads in pertinent part:

> "In view of claims made in pending litigation by the tribe, the conference amendment specifically adverts to power site and dam site value but provides that this reference shall not be taken as an admission by the Government that payment of just compensation therefor is required. This is designed to avoid prejudicing any independent judicial determination of this tribal claim that may be called for in the premises. The executive branch will be free, if it chooses to do so, to maintain the position that, to use the language of the President (S. Doc. No. 128, 84th Cong.) 'General principles of constitutional law exclude power site values in determining "just compensation" * * * ' " (House Report No. 2010, 85th Cong., 2nd Sess., pp. 3-4.)

This court's decision in *United Stetas of America v.* 5,677.94 *Acres of Land, etc.,* was before Congress when the jurisdictional act was considered and enacted. The act quite clearly was designed to avoid aiding or prejudicing either party in their respective contentions

as to whether power site value is an element of just compensation. Congress did not attempt to enlarge or restrict existing law with respect to what elements of value the court should take into consideration. It is my conclusion that the $2,500,000 grant was intended to include all elements of value and that the court should determine (1) what elements of value should be considered in determining just compensation; and (2) whether any additional compensation is owing for the taking, and if so the amount thereof. In other words, it is the function of the court to determine "just compensation" as though Public Law 85-523 had not been enacted; and, if the amount exceeds $2,500,000, to enter judgment for any excess.

QUESTION 2:

The Particular Elements of Damage Which Should Be Considered in Determining Just Compensation for Water Power or Dam Site Value of the Lands Described in the Aforesaid Jurisdictional Act.

Although counsel have filed comprehensive briefs setting forth their views regarding the elements of value which should be considered in determining just compensation, I find it difficult to arrive at a definitive conclusion on many points upon which there is disagreement. It is possible that some of these differences may be resolved following another pretrial conference, where counsel will have an opportunity to present their respective contentions and indicate more

specifically what evidence they intend to offer. A determination of other questions will no doubt depend upon the evidence produced at the trial. This memorandum will simply set forth my tentative conclusions on some of the points in controversy so that counsel may be better prepared to present their views at the next conference.

GENERAL PRINCIPLES

There is little dispute regarding the general principles for determining "just compensation." There is disagreement regarding their application to this case. The parties agree that the standard for measuring "just compensation" customarily is the "fair market value" as of the date of taking, and that "fair market value" means the amount of money which a purchaser, willing but not obliged to buy the property, would pay to an owner, willing but not obliged to sell it.

The bases for determining "just compensation" when property is of a kind seldom exchanged and with no "market price" are set forth in *Kimball Laundry Co. v. United States,* 1949, 338 U.S. 1, 69 S. Ct. 1434, 93, L. Ed. 1765. The general rules with respect to applying the concept of market value in determining "water power value" were well expressed in *United States v. Powelson,* 4 Cir. 1943, 138 F. 2d 343, cert. denied 321 U. S. 773, 64 S. Ct. 611, 88 L. Ed. 1067.

Various approaches were considered by the expert witnesses in the *Twin City* cases (see 86 F. Supp. 467; 114 F. Supp. 719, affirmed 215 F. 2d 592; 221 F 2d 299). While the Supreme Court held that dam site value could not be allowed, the approaches of the various appraisers in these cases may be of some assistance in the event this court is correct in its conclusion that water power or dam site value may be allowed in the instant case. I have obtained the transcripts on appeal in those cases and will have them available for the use of counsel if desired.

Apparently the parties agree that the value of the lands must be determined on the basis of opinions offered by experts in the development of multi-purpose dams. There is apparently no intention on the part of either party to offer evidence of comparable sales or rental values as independent evidence. The question arises, however, as to the extent to which the appraisers may consider comparable sales, rental values, and property earnings in arriving at their opinions of value. (This will be discussed in more detail later herein.)

The parties apparently agree that the experts should be permitted to express an overall opinion on value after taking into account all relevant factors. There is some disagreement with respect to what factors are relevant. The factors considered by the expert witnesses are not in themselves direct evidence of the

market value of the land condemned but may be considered only for the purpose of determining what weight should be accorded to the testimony of the expert in his ultimate opinion as to fair market value. See discussion and cases cited in *United States v. Land in Dry Bed of Rosamond Lake, S.D. Cal.,* 1956, 143 F. Supp. 314.

A qualified expert should be permitted to give his reasons for his overall opinion and state the factors he has taken into consideration. If his reasons are fallacious or he has considered factors which are not relevant, these facts are usually exposed on cross examination and his testimony accordingly discredited. Except as to those factors and elements of value which are clearly improper or irrelevant, considerable latitude must be permitted the expert witnesses in using factors they deem relevant in arriving at their overall opinions of value. See discussion in *United States v.* 70.39 *Acres of Land,* S.D. Cal. 1958, 164 F. Supp. 451, 489.

VALUE TO TAKER

It is a well recognized rule that "value to the taker" cannot ordinarily be considered and that the "value of the property to the Government for its particular use is not a criterion." *United States v. Chandler-Dunbar W. P. Co.,* 229 U.S. 53, 81, 33 S. Ct. 667, 57 L. Ed. 1063, 1082. Defendant contends that under this

rule each appraiser "should be warned that no value can be assigned to flood control, navigation, erosion control, silting control, pollution abatement, stream flow control, or fish and wildlife conservation." The Government recognizes that if dam site value may be considered at all, values which may arise from the use and availability of the Yellowtail site "for power production, irrigation, domestic water supply, and recreation" may be considered, but contends that these values must be based only on values which a private enterpriser could realize.

Plaintiff contends (1) that there may be circumstances, of which the instant case is one, where a provable economic value cannot be excluded * * * by pinning a label "value to the taker" upon this element of value; (2) that by reason of section 10 of the Crow Act and the trust relationship between the parties, the Government cannot rely upon the principle of "value to the taker" to beat down the value of the ward's property; and (3) that in determining compensation to the Flathead Indians for use of their reservation for a power site and reservoir, "value to the taker" was used.

Plaintiff suggests, however, that any rule regarding "value to the taker" may wash out of the picture, since Yellowtail Dam as built by the Government might have navigation and flood control values, but only at the sacrifice of power and irrigation values. Plaintiff suggests that, "In private hands (where the

private owners heedless of the navigation and flood control values inherent in Yellowtail Dam) the dam's value for power and irrigation purposes might be correlatively greater than it will be in the hands of the United States."

It is my tentative conclusion that the Government's position is correct with respect to values attributable to flood control, navigation, etc., but this question will not of course be important if plaintiff proceeds on the theory set forth in the preceding paragraph.

Plaintiff states in its last memorandum relative to procedures that one approach adopted by its experts will be the method of "sharing of net benefits," in which flood control and similar benefits would be considered. It is my tentative conclusion that this approach would not be proper in a condemnation action, but I will hear both parties on this point at the pretrial conference.

It was held in *Kimball Laundry Co. v. United States, supra,* that where property has no "market price," recourse must be had to other means of ascertaining value, including "value to the owner" as indicative of value to the potential owners enjoying the same rights. While I feel that this rule is applicable here, I question whether it can be extended to include "value to the taker" in the nature of flood control, navigation and similar factors created only by the Government's demand.

TREATMENT OF INDIAN TRIBE

In *United States v.* 5,677.94 *acres, etc.* this court recognized the rule that Indians are entitled to the same treatment in condemnation actions as other landowners, but concluded that in the Crow Allotment Act of 1920 Congress expressly recognized the rights of the Crow Tribe to lands chiefly valuable for water power development, and that these property rights accordingly may not be overlooked in determining just compensation. While plaintiff is entitled to water power and dam site value as a part of just compensation, in determining that value plaintiff is entitled to the same treatment as any other landowner similarly situated, unless there are statutes which impel a different conclusion. Plaintiff contends that in Section 10 of the Crow Allotment Act and Section 10(e) of the Federal Power Act, Congress has made it plain that "it intended the Crow Tribe should have the full exploitable value of its chief tribal assets" and that the Government cannot excise elements of value on the ground that these elements are "value to the taker." It is my tentative conclusion that the plaintiff's conclusions are too broad and sweeping. More specifically, however, it is argued that the "rental value which the Crow Tribe might have received had a federal license been issued should, upon being capitalized, be given great weight in now setting a fair value for the land."

This contention will be given further consideration at the pretrial conference. Defendant apparently has

not commented on the effect, if any, of Section 10(e) of the Federal Power Act and the practice of the Government agencies thereunder, upon the value of the dam site itself. Counsel for the defendant are requested to present their views on this point. It is suggested also that both sides consider whether this is not in the nature of a special value to the "owner" rather than to the "taker."

COMPARABLE SALES

As noted above, apparently neither side will offer any comparable sales as substantive proof of the value of the property. Plaintiff indicates that its expert witnesses will take into consideration the purchase by the Government of Boysen Dam. Defendant argues that comparable sales may be considered only if the appraiser has prepared and submitted a statement showing the basis of comparison and covering the criteria set out on page 17 of this memorandum.

The general rule here applicable was well stated in *United States v. Johnson,* 9 Cir. 1960, 285 F. 2d 35, 41, where the court said:

> "Quite obviously when evidence of the price for which similar property has been sold is offered as substantive proof of the value of the property under consideration, a foundation should be laid showing that the other property was sufficiently near that in question, and that it was sufficiently like the property in question as to character, situ-

> ation, usability and improvements to make it clear that the two tracts were comparable in value. However, where evidence of sales of similar property is offered not as substantive proof of value, but merely in support of, and as background for, the the opinion of an expert as to the value of the land in question, the requirement of such foundation is not so strict. As was stated by Chief Judge Parker in *United States v.* 5139.5 *Arces of Land etc., supra,* 'If the expert has made careful inquiry into the facts (of such sales), he should be permitted to give them as the basis of the opinion he has expressed. If he had not made careful inquiry, this will be developed on cross examination.' "

The court in the *Johnson* case relied largely upon *United States v.* 5139.5 *Acres of Land, etc.,* 4 Cir. 1952, 200 F. 2d 659; and *United States v.* 25.406 *Acres of Land, etc.* 4 Cir. 1949, 172 F. 2d 990, cert. denied 337 U. S. 931, 69 S. Ct. 1484, 93 L. Ed. 1738.

RENTAL VALUE.

Plaintiff indicates that its expert witnesses will consider the rentals paid for use of Indian tribal lands for the Kerr and Pelton Dam Sites. Defendant contends that these situations are wholly dissimilar and should not be considered.

It is my tentative conclusion that if the expert witnesses conclude that the situation with respect to these dam sites are sufficiently similar to aid in arriving at a valuation of the Yellowtail Dam Site and would

have been considered by a prospective purchaser, the experts may take these rentals into consideration and give their reasons for their conclusions. The defendant may of course offer proof of dissimilarities. The court must then consider the weight of any evidence of value which may have been determined in part from considering these rental values.

PROSPECTIVE EARNINGS

Apparently the parties agree that prospective earnings may be considered by the expert witnesses as one of the factors to be weighed in determining market value.

LOCATION FACTOR

The parties agree that the location of a site has relevance in determining value. Defendant contends, however, that plaintiff may not attribute a value to an upstream location which is conditioned upon Congress passing a law which will permit an upstream dam site owner to collect charges from the Government for benefits to the Government's downstream dams. Plaintiff contends that "there is such a prospect of legislation as any prospective purchaser would necessarily take into account" and that, "economic practicalities would force downstream dam owners and the Yellowtail Dam owner together, since joint operation unquestionably would result in immense benefits."

It is my tentative conclusion that the question of whether this factor may properly be considered will depend to some extent upon the evidence, and may well go to the weight rather than competency of any opinion which may take it into consideration.

QUESTION 3:

> Should Water Power or Dam Site Value be Limited to the Physical Dam Site Plus the Reservoir Area on Crow Tribal Lands, or Extend to the Physical Dam Site Plus the Reservoir Area Which Extends into Wyoming, Including White Ownership and Federal Lands.

It is plaintiff's view that all water or dam site value attributable to the Yellowtail Dam Site must be attributed to the lands owned by the plaintiff, that any feasible site and the vast bulk of the natural water storage are within the confines of Crow-owned lands; and that the "Crow Tribe alone holds the unavoidably necessary lands and whether any other lands would ever be utilized is too remote or speculative to attribute any dam site or water power value to them."

Defendant contends that plaintiff owns but 20 percent of the land required for the Government's dam and reservoir project; that "the value of the Indians' interest in the Yellowtail Dam Site and reservoir site cannot be based upon the value of a dam which will flow five times the area of the land owned by plaintiff," but "must be based on a dam which will flow only the area owned by plaintiff." Defendant relies primarily upon the case of *United States v. Powelson,*

1942, 319 U.S. 266, 276, 277, 279, 87 L. Ed. 1390, 63 S. Ct. 1047.

Plaintiff distinguishes and reconciles the *Powelson* case and argues that if plaintiff is not entitled to undiminished dam site value "the amount of diminishment cannot exceed the reasonable 'market value' of other lands which may be needed for accommodation of a reservoir behind the optimum dam." Plaintiff refers to the holding of the district court in *United States v. Twin City Power Co.,* 114 F. Supp. at 724, where the court accorded full power site value to the company and deducted from the total award the "market value" of the additional lands it would have needed for the project.

The final ruling on Question 3 obviously will depend on the evidence.

Only the lands of the Crow Tribe are encompassed by the Crow Allotment Act. The non-Crow landowners may not claim water power value in determining the fair market value of their lands. A private purchaser of the Crow lands, interested in acquiring a dam site and building a dam equal to Yellowtail, would consider the fair market value of the non-Crow holdings which it would be necessary to acquire to complete the project. This would have a direct bearing upon the amount he would be willing to pay the Crow Tribe for the physical dam site and reservoir land. In other words, if the plaintiff has correctly stated the facts,

a purchaser presumably would be willing to pay dam site or water power values to the Crows for a dam impounding water over the entire area less the cost of necessary acquisitions of non-Crow lands at their fair market value, (which, as noted above, would not include water power value).

QUESTION 4:

Whether the Value Should be Restricted to the 50-Year Permit Provided for under the Federal Power Act.

This question must be answered in the negative.

It is true, as defendant contends, that market value is the price a willing buyer would pay a willing seller. It is true also that section 17 of the Federal Power Act prescribes a 50-year limitation for a lease to a private enterpriser. At the end of the 50-year period the land reverts to the Indian Tribe unless there is a new lease agreement.

But here the Government is acquiring the land in perpetuity. The question is not what a willing buyer, either Government or private, would pay for a 50-year lease, but what either would pay for the fee. The Government may not take advantage of the Federal Power Act to limit the amount of just compensation for a fee title to what just compensation would be for a 50-year leasehold.

Done and dated this 19th day of July, 1961.

W. J. Jameson
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

THE CROW TRIBE OF INDIANS OF MONTANA, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*.

Civil No. 214

OPINION

Public Law 85-523, approved July 15, 1958 (72 Stat. 361) provided for the transfer to defendant of 5,677.94 acres of plaintiff's land, and for the transfer to plaintiff's credit in the Treasury of the United States of the sum of $2,500,000, with the right in plaintiff to institute suit in this court or the Court of Claims to determine whether an additional amount is due plaintiff as just compensation for the transfer of its lands. In this action plaintiff seeks an additional $10,000,000.

Defendant acquired the lands as a site for Yellowtail Dam and Reservoir, a multi-purpose dam designed to "provide for irrigation, flood control, power generation, silt retention, improvement of fish and wildlife resources, recreational opportunities, municipal-industrial water and other benefits."[1] The dam is now under construction as a part of the Missouri River Basin Project authorized by Section 9 of the Flood

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1. Definite Plan Report (Ex. 31-A, p. 1).

Control Act of 1944 (58 Stat. 887). The Definite Plan Report for Yellowtail states that it is essential to the over-all plan for the Missouri River Basin.

In a comprehensive stipulation, the parties agreed, subject to objections as to relevancy and materiality, upon all facts relating to the location and characteristics of the dam site, plans for construction of the dam and its uses, construction costs, government studies, and other facts deemed pertinent by the parties and their expert witnesses. While there is no dispute as to the facts and supporting documents received as exhibts, there is a sharp difference of opinion with respect to the relevancy of certain facts and documents and their utilization by the expert witnesses in arriving at their opinions of value.

The lands in question, located on the Crow Indian Reservation in Montana, lie largely within a canyon through which flows the Big Horn River, a tributary of the Yellowstone River. The lower part of the canyon is well adapted for the construction of a hydroelectric dam and has long been recognized as a potential dam site.

The United States, in 1958, planned to acquire about 6,997 acres of Crow Tribal and allotted Indian lands within the boundaries of the Crow Reservation (inclusive of the 5,677.94 acres of tribal lands involved in this action), 10,778 acres of privately owned lands, and 2,486 acres of state owned land, for reservoir and other purposes in connection with Yellowtail Dam.

The United States also planned to include 10,604 acres held by the Government within the Yellowtail Reservoir taking area, making a total of 30,857 acres in the taking area. The dam, powerhouse and switchyard are all being constructed on the tribal land acquired by the United States pursuant to Public Law 85-523. The total estimated cost for the Yellowtail unit appearing in the 1963 budget documents is $100,192,000.

The parties agree that the power to be produced at Yellowtail is needed to supply present and future power needs in southeastern Montana and northeastern Wyoming. The Yellowtail power development is well centralized with respect to power markets. In planning the Yellowtail power plant, it was recognized that Yellowtail Dam "afforded an opportunity to install additional firm peaking capacity economically, which when integrated with the energy supplies from other existing and prospective power installations in the area would increase the area "firm power supply."[2]

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2. Stipulation, par. 18, p. 13, 14. The stipulation continues in pertinent part: "It was expected that the firm peaking capacity of the Yellowtail Powerplant, not associated with the firm energy produced at that plant and supplied to meet the firm power loads of the area served from the interconnected power system, would be marketed to other power systems in the area having generating installations, and would be integrated with the off-peak energy supplies of those systems in increasing the area firm power supply. After supplying a proportionate share of the irrigation pumping requirements of the Federal system, and deducting for average transmission system losses, and normal reserve requirements, it was expected that an average of some 113,500 kilowatts of firm power would be supplied to area loads with some 60,500 kilowatts marketed as firm peaking capacity, during the first 50 years of operation."

Before proceeding to a consideration of the principles applicable in determining just compensation and an analysis of the opinion evidence, it should be noted that defendant has renewed its contention that power site and dam value may not be considered in awarding "just compensation." Relying upon *United States v. Twin City Power Company,* 1958, 350 U.S. 222, 76 S. Ct. 259, 100 L. Ed. 240, and *United States v. Grand River Dam Authority* 1960, 363 U.S. 229, 80 S. Ct, 1134, 4 L. Ed. 2d 1186, defendant argues that if the Big Horn River is determined to be navigable, then water power value may not be considered.

This court held in *United States v.* 5,677.94 *acres of land, etc.,* 1958, 162 F. Supp. 108, that by reason of the provisions of the Crow Allotment Act of 1920, water power value may be considered as a part of just compensation.[3] In a pretrial brief in this case, defendant argued additionally that the $2,500,000 granted plaintiff under Public Law 85-523 constituted payment in full for any "special value" the lands in question "might have because of the language contained in the Alotment Act and because of their adaptability for power site purposes," and that additional

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3. By S. J. Res. 135 (84th Cong. 2d Sess.) Congress had appropriated "$5,000,000 as just compensation" for the transfer of the lands here involved. On June 7, 1956, the joint resolution was vetoed by President Eisenhower, the veto message reading in pertinent part: "General principles of constitutional law exclude power site values in determining 'just compensation' as the Supreme Court recently reiterated in United States v. Twin City Power Co., January 23, 1956." In the condemnation action, this court distinguished United States v. Twin City Power on the basis of the treaty with the Crow Tribe and recognition by Congress in the Crow Allotment Act of 1920 of a property right of the Crow Tribe in water power value of the lands in question.

payment may be made only in the event it is determined that "just compensation" (without water power value) is more than $2,500,000.

I find nothing in Public Law 85-523 or its legislative history, however, to indicate a Congressional intent that the appropriation of $2,500,000 should cover "special value for power site purposes" in full and that the court should exclude water power value in its award of "just compensation". On the contrary, it seems clear that Congress intended to leave to the courts the question of determining whether water power value should be considered in awarding just compensation. The concluding sentence of the Act reads: "Nothing contained in this joint resolution shall be taken as an admission on the part of the United States that just compensation is required for any particular element of value, including power site and dam site value, now or hereafter claimed by the Crow Tribe, *but the same shall be determined in accordance with the Constitution and the laws of the United States.*" (Emphasis added.)[4] This court's decision in *United States of America v.* 5,677.94 *Acres of Land, etc.* was before Congress when Public Law 85-523 was enacted. The Act was designed to avoid aiding or prejudicing either party in their respective contentions as to whether power site value is an element of just com-

4. See also Conference Reports on S. J. Res. 12, House Report No. 2010, 85th Cong., 2d Sess., pp. 3-4, and discussion of report in both House and Senate, 104 Cong. Rec. pp. 12975 to 12980, p. 13006.

pensation. Congress did not attempt to enlarge or restrict existing law with respect to what elements of value the court should take into consideration.

Plaintiff is entitled to just compensation for the property transferred. The parties agree that the standard for measuring "just compensation" customarily is the "fair market value" as of the date of taking, and that "fair market value" means the amount of money which a purchaser, willing but not obliged to buy the property, would pay to an owner, willing but not obliged to sell it. Where there is an established market through sales of comparable property, it is relatively simple to determine market value. In the absence of any "going market," the problem becomes more difficult. Then, "this amount can be determined only by a guess, as well informed as possible, as to what the equivalent (value) would probably have been had a voluntary exchange taken place."[5] This concept has special relevance here. Not only is there no "going market," but there are also many intangible and uncertain factors which make difficult the application of any of the standard and recognized approaches to the valuation of property. Obviously this accounts in part for the wide variation in the opinions of value given by the expert witnesses for the respective parties.

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5. Kimball Laundry Co. v. United States, 1949, 338 U.S. 1, 6, 69 S.Ct. 1434, 93 L. Ed. 1765. See also United States v. Powelson, 4 Cir. 1943, 138 F. 2d 343, cert, den. 321 U.S. 773, 64 S. Ct. 612, 88 L. Ed. 1067.

Two well qualified expert witnesses testified for each party: for the plaintiff, Dr. Hershel F. Jones, an economist employed as a consultant by H. Zinder & Associates; and J. A. Krug, former Secretary of the Interior; and for the defendant, W. L. Patterson, a civil engineer and partner in the engineering firm of Black & Veach, and Kenneth G. Tower, a civil engineer with the Federal Power Commission. All have had extensive experience in analyzing power supply problems, rates, power markets and transmission.

The expert testimony was involved, technical and complicated. All the expert witnesses were obviously and understandably partisan, as reflected in their opinions of just compensation. Jones and Krug expressed the opinion that the lands acquired were worth at least $12,500,000. Using nine different methods or variations of methods, they arrived at figures ranging from $10,300,000 to $26,650,000. On the other hand, Patterson and Tower were of the opinion that the $2,500,000 already paid exceeds the dam site value of the lands taken.

All of the experts agreed that an accepted method for valuing potential water power sites is to compare the cost of producing power at that site with the cost of providing an equivalent amount of power by the least expensive, practicable alternative method. All agreed also that the least expensive, practicable alternative here is a steam plant. After careful study

of the various methods presented for consideration, the court is of the opinion that a value established by this method would be most likely to result in an award of "fair market value," insofar as the production of an equivalent amount of power is concerned. Plaintiff claims, however, that consideration must be given also to the superior peaking capacity of the hydroelectric plant and to "important collateral benefits." These benefits will be discussed later herein.

In comparing a single purpose hydroelectric plant with a steam plant alternative, Dr. Jones arrived at a dam site value of $19,139,000. This sum represents the difference between the estimated cost of a steam plant of $98,784,000 and the cost of a single purpose hydro plant of $79,655,000.

In arriving at the estimated cost of the steam plant, Dr. Jones first used figures contained in a 1950 Bureau of Reclamation report on Yellowtail, estimating the cost of a steam plant alternative at $96,531,355. By using data made available as of 1958 and 1961, Dr. Jones updated this figure to $98,794,000, computed as follows:

Steam Construction Cost 200,000 kw at $160/kw		$32,000,000
Steam Annual Costs		
O & M	$2,553,000	
Replacement	518,000	
Total		$3,071,000

Hydro Annual Costs			
O & M	225,000		
Replacement	250,000		
Total		475,000	
Difference		$2,596,000	
Capitalized at 3%			66,794,000
			$98,794,000

(Ex. 2)

Dr. Jones arrived at his estimated cost of a single purpose power project at Yellowtail as follows:

"1.	USBR 1961 estimate of total costs of Yellowtail Unit as shown by stipulation		$100,192,000
2.	Engineering, overhead and other indirect costs included in Item 1		17,413,000
3.	Direct construction costs		$ 82,779,000
4.	USBR estimate of cost to Crow tribal lands included in Item 3	$2,500,000	
5.	USBR estimate of cost of tourist and recreation facilities included in Item 3	532,000	
6.	Estimated separable cost of flood control included in Item 3	5,949,000	
7.	Estimated separable cost of irrigation included in Item 3	595,000	
8.	Subtotal		9,576,000
9.	Direct construction cost net of the cost of Crow tribal lands, tourist and recreation facilities, and flood control allocation		73,203,000
10.	Engineering, overhead, and other indirect cost at 8.1% of total construction costs		6,452,000
11.	Total estimated construction costs of Yellowtail Unit after subtracting costs of Crow tribal lands, and separable costs of tourist and recreation facilities, irrigation and flood control, and after adjustment of indirect costs		$ 79,655,000

(Ex. 5)

Mr. Krug did not make separate calculations of value himself, but agreed generally with Dr. Jones' methods and conclusions.

Defendant and its expert witnesses question Jones' approach in four particulars, contending (1) that the Bureau of Reclamation figures prepared in 1950 and used as a basis for Jones' study were not compiled to reflect dam site value but were intended solely for the purpose of allocating funds between power and flood control;[6] (2) that Jones failed to include the cost of interest during construction; (3) that he erroneously reduced the engineering and overhead costs from $17,413,000 to $6,452,000; and (4) that the 3 percent rate of capitalization is too low.

Patterson would revise Jones' compilation as follows:

	Jones	Federal Project (3%)	Non Federal Public Project (5%)
Steam Construction Cost	$32,000,000	$32,000,000	$32,000,000
Steam Annual Costs			
O & M	2,553,000	2,553,000	2,553,000
Interim Replacements	112,000	112,000	112,000
Depreciation (35 yr. Sinking Fund)	406,000	529,257	354,295
Interest ($32,000,000 Plant)	—	960,000	1,600,000
Total Annual Costs	$ 3,071,000	$ 4,154,257	$ 4,619,295
Certain Hydro Annual Costs			
O & M	225,000	225,000	225,000
Interim Replacements	250,000	250,000	250,000
Insurance	—	95,828(1)	101,000(1)
Total Certain Hydro Annual Costs	$ 475,000	$ 570,828	$ 576,000
Difference	$ 2,596,000	$ 3,583,429	$ 4,043,295

6. Dr. Jones readily admitted that the purpose of the Bureau's 1950 compilation was to allocate costs and, he added, to "convince Congress that Yellowtail was a good project." When asked for his own opinion on the Bureau's compilation, Dr. Jones' answers were somewhat equivocal. He emphasized the fact that they were the Bureau's own figures and said he would "rely upon it to some degree," but would also want to look at calculations similar to others he had made.

	Federal Project (3%)	Non Federal Public Project (5%)
Difference Capitalized at Interest Rate for 50 years equals Comparable Steam Alternative	$92,200,793(2)	$73,814,086(3)
Hydro Plant Investment	95,827,650(4)	101,000,000(5)
Amount Hydro Plant Investment Exceeds Comparable Steam Alternative	3,626,857	27,185,914

(1) .1% of hydro plant investment

(2) $3,583,429 divided by .03886549 — $92,200,793

(3) $4,043,295 divided by .05477674 — 73,814,086

(4) Total cost Yellowtail Unit 100,192,000

Less	
Crow Land	2,500,000
Tourist and Recreation Facilities	630,000
Flood Control	7,200,000
Irrigation	720,000
Sub total	$11,050,000
Balance	$89,142,000
Interest during Construction (7.5%)	6,685,650
Total Hydro Plant Investment	$95,827,650

(5) Exhibit 11

(Ex. 50)

It will be noted that on a 3 percent federal project, Patterson arrives at a hydro plant investment of $95,827,650 as opposed to Jones $79,655,000 — a difference of $16,171,650. This results from (1) the inclusion of engineering, overhead and other indirect costs at $17,413,000, an increase of $10,960,000 over Jones'

$6,452,000; (2) the inclusion of $6,685,650 interest during construction; and (3) a deduction of $11,050,000 for flood control, irrigation, and recreation, an increase of $1,474,000 over Jones' $9,576,000.

In his own compilation, Patterson arrived at a cost of $111,360,000 for a single purpose hydro project, based on Bureau estimates, as of August 8, 1958, of $109,300,000 for a multi-purpose project. This included interest during construction in the amount of $10,123,400, computed at 10 percent of total, excluding land and land rights. On the basis of 1963 budget documents, Patterson reduced his estimate of cost for a single purpose unit to $96,800,000.[7]

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7. On the basis of the 1963 budget estimates for a multi-purpose project Patterson arrived at an investment cost of $96,800,000 for a single purpose hydroelectric project as follows:

Investment cost multi-purpose project	$100,192,000
Adjustments	
Land and land rights	3,900,000
Separable flood control costs exclusive of land and land rights	6,800,000
Separable irrigation costs exclusive of Yellowtail Camp	600,000
Observation building	130,000
Recreational development	500,000
Rehabilitation of fish	65,000
Yellowtail Camp	203,000
Total adjustments	$ 12,198,000
Total investment cost excluding adjustments	87,994,000
Interest during construction	8,799,400
Total	$ 96,793,400
Use	$ 96,800,000

(Ex. 43)

Patterson computed the cost of an alternative steam plant at $37,600,000, as follows:

180,000 kw at $190 (3 60,000 units, which he testified would be capable of gross continuous capacity of 205,000 kw)	$34,200,000
Substation costs	3,000,000
Land Costs	400,000
Total	$37,600,000

(Patterson, Direct Testimony, p. 61)

Patterson estimated the annual expenses for the steam plant at $2,579,915 and for the hydro plant at $350,000, resulting in a difference of $2,229,715.

Patterson did not capitalize this amount and add the resulting figure to the cost of the steam plan,, as did the Bureau and Jones. Instead he figured annual depreciation and interest costs for a 50-year period. For the hydro plant, with an estimated cost of $111,360,000, he used an annual depreciation charge of $1,551,155, or approximately 1.40 percent of the gross plant investment, basing this allowance on the useful life of the dam and reservoir and estimated average service lives for other items of the plant. For the steam plant, with an estimated investment of $37,600,000, he used an annual depreciaion charge of $1,074,286, or approximately 2.86 percent of the gross plant investment, based on an estimated average service life of 35 years.

Starting with the hydro plant investment of $111,360,000 and deducting the equal annual depreciation

charge of $1,551,155, Patterson determined the amount of remaining investment for each year of the plant's operation. Applying a 4 percent interest charge to the remaining total for each year, he determined the amount of annual interest. Under this method, in the first year of operation, the hydroelectric plant depreciation cost was $1,551,155, the interest cost $4,454,000, and the cost of operation $350,000, for a total of $6,355,555. For the steam plant operation for the first year, the depreciation cost was $1,074,286, the interest cost $1,504,000, and the operation costs $2,579,750, for a total of $5,158,001, or $1,197,554 less than the annual cost for the hydroelectric plant.

In the 35th year, for the hydroelectric plant the depreciation cost was $1,551,155, the interest cost $2,524,589, and the operating cost $350,000, for a total of $4,425,744. For the steam plant, depreciation was $1,074,286, the interest cost $42,971, and the operating cost $2,579,715, for a total of $3,696,962, or $728,782 less than the annual cost for the hydro plant.

Summarizing the present worth of the annual cost for each plant for the 50-year period resulted in costs of the hydroelectric plant of $16,660,700 more than for the steam electric plant.

Patterson also made comparisons on the basis of continued inflation trends, and used a second method, which he termed practical financing. The following table shows the results of those computation:

	Excess Cost of Hydroelectric Plant Over Steam Electric Plant		
	Present Cost Levels	With Continued Inflation Trends	Equal Weighting of Present Cost Levels & Continued Inflation Trends
	$	$	$
Amortization and Interest Fixed Charges on the Basis of Equal Annual Depreciation over the Expected Service Life of the Facilities with Annual Interest Costs Computed on the Remaining Value of the Investment	16,660,700	2,259,000	9,459,850
Practical Financing Fixed Charges on the Basis of Securities Necessary to Finance the Construction and Continued Operation of the Facilities	22,539,100	8,180,100	15,359,600

(Ex. 27)

Jones contended that Patterson's procedures for calculating present values over a 50-year period were erroneous in that: (1) It is impossible to estimate with accuracy the annual costs for each of 50 years, since this would necessitate knowing the replacement cost for each hypothetical plant rather than using broad averages of service lives of equipment; (2) Patterson failed to consider the value of the remaining undepreciated hydroelectric plant; (3) The inability to detail year by year the replacement requirements of a steam plant and failure to take into account the fact that a steam plant requires more replacements than a hydro plant in the earlier years of the 50-year analysis; (4) Patterson's reliance upon a nameplate rating of 180,-

000 kilowatts to provide a continuous capability of 205,000 kilowatts for a steam plant, since a hydro plant also has a greater peaking capability than its name-plate rating.

Using data from Patterson's exhibits and making what he deemed necessary adjustments, Jones arrived at the following results:

Example of Use of Present Worth of Average Revenue over 50 Years

	50-Year Total Annual Cost	50-Year Average Annual Cost	Present Worth of Annuity at 4% of 50-Year Average Annual Costs
	$	$	$
Without Inflation			
Hydro Plant	219,244,175	4,384,884	94,196,078
Steam Plant	227,820,032	4,556,401	97,880,606
Steam excess over Hydro			3,684,528
With Inflation			
Hydro Plant	235,944,400	4,718,888	101,372,096
Steam Plant	290,155,878	5,803,118	124,952,737
Steam excess over Hydro			23,580,641

Average $\frac{3,634,528 + 23,580,641}{2} - 13,632,584$

(Ex. 59)

Example of Consideration of Present Worth of 50th Year Undepreciated Plant

	Present Worth of 50 Year Annual Cost	Deduct Present Worth of Undepreciated Plant	Net Present Worth of 50 Year Costs
	$	$	$
Without Inflation			
Hydro Plant	105,369,425	7,538,104	97,830,721
Steam Plant	103,441,368	3,383,999	100,057,369

Steam excess over Hydro			2,226,648
With Inflation			
Hydro Plant	109,717,314	8,732,713	100,984,601
Steam Plant	122,324,444	4,793,784	117,530,660
Steam excess over Hydro			16,546,059

Average $\frac{2,226,648 + 16,546,059}{2} - 9,386,354$

(Ex. 60)

Plaintiff's counsel in their reply brief contend that if Patterson had "modernized his assumptions" in Exhibit 50, he "would have concluded that the Yellowtail site was worth at least $5,706,000," instead of having a negative value of $3,626,857. The computations are summarized as follows:

	Patterson	Revised
Steam Construction Cost at $160/kw	$32,000,000	$ 33,600,000
Steam Annual Costs	4,154,257	4,517,000 [8]
Certain Hydro Annual Costs	570,828	570,823
Difference between Steam and Hydro	$ 3,583,429	$ 3,946,172
Capitalized Difference at .03886549	$92,200,793	$101,534,000
Hydro Plant Investment	95,827,650	95,827,650
Excess of Steam Plant Alternative	— $ 3,626,857	$ 5,706,350 [9]

(Plaintiff's Reply Brief p. 14)

Through different approaches, Tower arrived at values of the dam site ranging from $1,300,000 to

8. In revising the annual costs for steam, plaintiff increased Patterson's costs, discredit the conclusions of the other party's experts and arrive at widely divergent figures.

9. This illustrates how both sides, by changing a few basic assumptions in estimate of operation and maintenance from $2,553,000 to $2,835,000, interim replacement from $113,000 to $118,000, depreciation from $529,237 to $556,000, and interest from $960,000 to $1,008,000.

$1,540,000, but testified that he would "prefer to attach no particular significance to either (figure) other than to say that they are indicative of the fact that the power site value properly creditable to the Crow Indian Tribe on the basis of a single-purpose power project analysis is less than $2.5 million." Jones submitted what he considered necessary adjustments in Tower's computations, which Jones concluded would justify a payment of at least $12,500,000.[10]

Each side has been more persuasive and convincing in showing the fallacies in the methods used by the experts for the other side than in defending the methods and conclusions of its own experts. Obviously, if Patterson and Tower are correct in their analyses and conclusions, the plaintiff has been overpaid. The crux of the case is whether the plaintiff, through its experts (including revision of defendants valuations), has assumed its burden of showing a value in excess of $2,500,000 and if so, the amount thereof.

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10. Tower testified that the best possible single-purpose power development would be a 400,000 kw station with the dam at elevation 3610. He computed the value of the site to the Crows on the basis of "net benefits." After dividing the net benefits equally between the site and the project, he computed the Crows' proportionate share of the site benefits at 31.3% by reason of the fact that the tribal lands "comprise only slightly more than 31% of the total land necessary for the project development." On this basis he arrived at a site value of $1,280,000. Increasing the tribal share from 31.3% to 37.7% (and assuming "holdup" prices for other lands) resulted in a site value of $1,300,000. A similar computation at 37.7% without using "holdup" values resulted in a site value of $1,540,000. Through "revising" Tower's assumptions and figures, plaintiff's experts on this basis arrived at a valuation in excess of $12,500,000. In addition plaintiff argues that a dam built to elevation 3610 would inundate but 7088 acres, so that the taken lands would "appear to constitute 75% of all acreage required." (Plaintiff's Reply Brief, p. 86, referring to Ex. 31 (b), Drawing 32.)

Plaintiff's method of comparing the cost of Yellowtail with a steam plant alternative is, in my opinion, subject to the fallacies suggested by the defendant, i.e., the failure to include interest during construction, using a cost for engineering and overhead substantially below the actual cost to the Government, and a low capitalization rate.

With respect to their other methods of valuation, the plaintiff contends (1) that the large prospective earnings from the Crow Tribe's development of the dam site establish a value of at least $13,000,000; (2) that applying the formula negotiated with the Portland General Electric Company for the two dam Pelton-Round Butte Project on lands of the Warm Spring Indians results in a value of at least $11,500,000; and (3) applying the benefit-sharing method demanded by the Interior Department in fixing the rental to be paid the Flathead Indians by Montana Power Company for the third unit of Kerr Dam results in a value of over $16,000,000.

While these approaches were proper, I am compelled to conclude that they are of limited value in determining the dam site value. From the evidence as a whole, I am unable to find that as of July 15, 1958, or today, there was any reasonable prospect of the Crow Tribe developing a single-purpose power project; nor is there any evidence that any private utility was interested in doing so. The only feasible project was

the multi-purpose dam, which the United States is in fact constructing.

Acceptance of the contentions of the Government and the testimony of its experts in their entirety might raise a serious question of the economic feasibility of the construction of Yellowtail by the Government as well as anyone else. The Government, however, is in fact constructing the dam and presumably considers it an economically sound venture.[11] The Crow Tribe is entitled to just compensation for the site which is being used in the construction of the dam.

The dual role of the Government, and particularly the Department of Interior, in the acquisition of this dam site was considered in the condemnation action (162 F. Supp. 108, at 117, 118). As set forth in that opinion, the Secretary of the Interior and the Department's Solicitor, in expressing their views on the original bill to compensate the Crow Tribe for the Yellowtail dam site, recognized that the Department's relationship with the Tribe is in many respects analogous to a trustee. At the same time, in acquiring the rights of the Tribe, the Government has contended that water power value may not be allowed and that just compensation must be limited to what in effect would be

11. In many respects I find it difficult to reconcile the Government's evidence and contentions in this case with statements made to Congress and press and magazine articles emphasizing the importance and value of the dam site.

a nominal value for grazing and timber purposes.[12] The situation was summarized by the Solicitor: "*** it is a very profound question and, to these Crow Indians a very vital legal question, as to whether or not this power-site feature is a compensable item. If it is, they get a lot of money; in anybody's language they get a lot of money. If it is not, if you are going to step in there and condemn the land and only pay the naked land value, then, Senator, so far as the Department is concerned, and as the guardian of Indian affairs, I think we all would hesitate to do that."[13]

The Department of the Interior has been zealous, and properly so, in making certain that the Indian tribes owning the lands in the Pelton-Round Butte and Kerr projects received full rental value for their power sites. As set forth supra, it is difficult in this case to draw any exact analogy with either of those projects by reason of many dissimilarities, and the evidence accordingly is of limited value. The Government's representation of the Indian tribes in these rental projects does, however, manifest a policy to

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12. Roger C. Theusen, land appraiser for the Department, testified that the market value of the lands acquired from the Crow Tribe as of July 15, 1958, was "$39,750 for the 5,677.94 acres." This approach appears inconsistent with the provision of Section 10 of the Crow Allotment Act of 1920 that the lands "chiefly valuable for the development of water power shall be reserved from the allotment or other disposition for the benefit of the Crow Tribe of Indians."

13. From testimony of Solicitor of the Interior Department before the Senate Committee on Interior and Insular Affairs (84th Cong. 1st Sess.) at hearings on "Yellowtail Dam — Hardin Unit, Montana," pp. 107-108, Dec. 9, 1955. See also footnotes 12 and 14 at pp. 117, 118, 162 F. Supp.

make certain that the Indians receive full value for their property rights in any dealings with private utilities. The Crow Tribe is entitled to the same consideration in this action.

There is disagreement as to the installed generating capacity of the dam. The Definite Plan Report (Vol. I, p. 19) states that, "The required installed capacity to provide for normal peaking would be about 130,000 kilowatts. However, with a present and growing shortage of peaking capacity for other systems to be interconnected with Yellowtail it is proposed to increase the installed capacity to 200,000 kilowatts." Plaintiff argues in its brief that, "The dam now is obviously planned as a 260,000 kw power plant." In disputing this figure defendant states that it does not know the source of plaintiff's information, that in any event it is hearsay, and that "at least, the officials in the Bureau and in Washington state that they have not been so advised." Yet, in a press release on August 17, 1963 (approximately three months after the last brief was filed) the Regional Director in Billings is quoted as saying that the plans have changed to increase the capacity to 250,000 kw.[14]

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14. The news story reads in pertinent part: "Yellowtail Dam is going to get more muscle. About 20 per cent more than in original plans, Bruce Johnson, of Billings, Region 6 director for the Bureau of Reclamation, said Friday. Plans have been changed to increase the dam's installed generating capacity to 250,000 kilowatts." (Billings Gazette, August 17, 1963, p. 5.) An article on "The Missouri Basin's Best Dam" in August 29, 1963 issue of Engineering News Record also states that the powerhouse capacity will be 250,000 kw.

While it is true, as defendant contends, that this is hearsay, it is difficult for the court to conclude that the dam has a capacity of 200,000 kw when a responsible official of the Government, prior to the court's opinion, issues a press release that the capacity has been increased to 250,000 kw. Obviously, the increase of capacity from 200,000 to 250,000 kilowatts with little, if any, additional cost would result in an increase in the value of the site. It is impossible from the evidence to determine any precise amount or percentage of increase in site value.

Whatever the generating capacity, it seems clear that Yellowtail is being constructed primarily as a peaking plant. The stipulation (par. 18, pp. 13-14) contains the following:

> "It was evident, however, that due to the high head available and the advantages of a short penstock installation, the Yellowtail Dam afforded an opportunity to install additional firm peaking capacity economically***.
>
> "Design of the powerplant was based on operating the reservoir at sufficiently high levels to assume full peaking capacity from the powerplant at practically all times.***"

In the Government's brief (p. 46) it is stated: "Furthermore, the annual kwh which can be produced at the hydro plant on this site is entirely dependent on the stream flow and the storage of water. *The plant is designed for peaking capacity only.*" (Emphasis added.)

Plaintiff argues that the peaking capability renders the power more valuable. There is substantial testimony that the peaking capability of a hydro plant like Yellowtail commands a higher value (by 5 to 10 percent) than the peaking capability of a steam-electric plant.[15] Defendant, in its brief, recognizes that "peaking power may have a unique value within a system."

The basis for an adjustment in favor of Yellowtail by reason of its peaking capability is also found in Bureau of Power Technical Memorandum No. 1 (Ex. 63) where under the title "Hydro-Steam Capacity Value Adjustment" (p. 7-8) it is said in part:

> "*Some hydroelectric plants are particularly well adapted for serving peak loads* *** Under favorable water conditions they may supply capacity in excess of their dependable capacity, making possible savings in over-all system costs. Also, in contrast to the relatively simple hydroelectric plant involving rugged machinery operating at low speeds and temperatures, the modern steam-electric plant is an intricate and complex mechanism involving high-pressure, high-speed, and high-temperature equipment, and it is subject to more equipment outages for maintenance and repair. These considerations and others less tangible are

15. Dr. Jones, on cross examination (Tr. p. 104) explained the value in these terms: "(K)ilowatt hours don't have the same value for many reasons. One important factor is where are the kilowatt hours located? What market are they being sold at? Another one is where are the kilowatt hours located in the load curve? Are these base load kilowatt hours or are they kilowatt hours which are available to serve peak loads, which are far more valuable kilowatt hours than base load kilowatt hours."

difficult to evaluate, so are matters which must be determined largely by the engineer's judgment. *Frequently, consideration of these factors will indicate that a credit to the hydroelectric project is warranted. The hydro-steam capacity value adjustment may range up to the equivalent of ten percent of the at-market cost of steam-electric power, but is normally equivalent to about five percent of such cost.*" (Emphasis added.)

Plaintiff's contention that it would have been practicable for the Crow Tribe itself to build a power plant at Yellowtail is predicated in large part upon the sale of the power at an average price of 8.55 mills. It is argued that, by reason of the peaking capability, investor owned utilities in the area, and particularly Montana Power Company, would be willing to purchase power at this price even though the going rate is substantially less and although a steam plant might produce power at a lower cost.

In the preparation of their expert testimony, both Krug and Patterson testified as to conversations with officials of Montana Power Company regarding that company's willingness to purchase Yellowtail power.[16] There is no convincing evidence, however, that Mon-

16. This testimony was not received as direct or independent evidence of what Montana Power Company would pay for power, but simply in explanation of the factors the expert witnesses took into consideration in arriving at their conclusions. As the court said in United States v. Delano Park Homes, 2 Cir. 1944, 146 F. 2d 473, 475, "It is just because he is an expert, and for that reason able to give its proper weight to all data, that he is allowed to appraise the property at all." See also United States v. Land in Dry Bed of Rosamond Lake, Cal., S.D. Calif. 1956, 143 F. Supp. 314; and United States v. 70.39 acres of land, S.D. Calif. 1958, 164 F. Supp. 451, 489.

tana Power or any other investor owned utility would pay 8.55 mills if the alternative cost through a steam plant would be substantially less than that amount.

Mr. Krug testified on direct examination that "the private power companies would be delighted to buy all of the power from Federal power projects at their best alternative cost." (Tr. p. 189). In rebuttal he referred specifically to a conversation with the president of Montana Power Company, as follows:

> "A. As you recall, Mr. Wheeler, I had a discussion with Mr. Corette, the president of Montana Power Company, and you were present. I asked him specifically whether his company would buy all of the Yellowtail capacity and energy at a cost to them equal to their own alternative cost for this capacity and energy. I believe I stated in my direct testimony that he gave me several reasons. I recall among them (a) that they needed this Yellowtail capacity and energy for their expected load growth, (b) that they were anxious to do everything they could to encourage the development of Yellowtail, and (c) they would like to have this Yellowtail power moving over their integrated transmission network." (Rebuttal Testimony of Krug, p. 2)

While it is clear that the private utilities would purchase Yellowtail power at their "best alternative cost," nowhere in Mr. Krug's testimony does it appear that he discussed with any official of Montana Power Company what the alternative cost might be, or more spe-

cifically whether Montana Power would pay 8.5 mills for the Yellowtail power. [17]

Mr. Patterson testified that in a conversation with Mr. Woy, rate engineer for Montana Power Company, Woy "positively stated that he would not be interested in power" at 8.55 mills per kilowatt hour. There is some disagreement regarding the purport of this conversation. It seems advisable accordingly to quote the pertinent cross examination of Mr. Patterson:

> "Q. Mr. Patterson would you tell me precisely what question you addressed to Mr. Woy?
>
> A. I will as well as I can recall. I believe my question to Mr. Woy was that we were engaged in a discussion of alternative power available from a proposed steam plant in this area in this case, and we were interested in knowing whether his company would purchase any of that power and the extent of course of their interest. And his answer was that he would not be interested in any power at 8½ mills under such a situation at all.
>
> Q. Now was this referring to Yellowtail?

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17. On cross examination, Mr. Krug testified:

"Q. Have you actually inquired of anybody as to whether they would be in the market for power produced at Yellowtail, for instance, on the basis of payment of 8½ mills for kilowatt hour?

A. I have inquired as to whether the utilities in this area would pay if they — would buy if they could all of the power at Yellowtail for their alternate cost of steam, and the answer is yes, they would if they could.

Q. Did you inquire what the alternate cost of steam was?

A. I think the alternate cost of steam we have developed is right. ***" (Tr. p. 193.)

A. It was with his knowledge that we were talking about the Yellowtail situation.

Q. I thought you said you asked him about a steam plant?

A. I did. I said we were in the Yellowtail case and involved in a discussion of alternate steam plant analysis.

Q. What you asked him was if he would be interested in buying — in purchasing any power produced at a steam plant at 8½ mills, is that correct?

A. That is what it amounts to, with the addition of the words which I have related." (Tr. pp. 636, 637.)

In his rebuttal testimony Mr. Krug stated that "Mr. Patterson did not ask Mr. Woy the proper question," and continued: "As I recall his testimony, he inquired of Mr. Woy whether the Montana Power Company would be interested in purchasing the energy from a steam plant at 8.55 mills per kilowatt hour." (Rebuttal Testimony of Krug, p. 2.) I do not construe Mr. Patterson's testimony as limiting his conversation with Woy to whether Montana Power Company would be interested in purchasing the energy from a steam plant at 8.55 mills.

The question of what Montana Power and other private utilities would pay for Yellowtail power could easily have been resolved by calling a representative

of the companies to testify at the trial. This was not done. Mr. Krug's testimony regarding his conversation with the President of Montana Power referred to the indefinite phrase "alternative cost," and there is no suggestion that a price of 8.55 mills was even discussed.

While it is clear that the power produced would have an additional value because of the peaking capacity of Yellowtail and that this value must inure to the benefit of the Crow Tribe in determining just compensation for the dam site, there is no proof which would warrant this court in assuming that such power could be sold at an average cost of 8.55 mills per kilowatt hour.[18]

Plaintiff argues that the Patterson and Tower analyses and valuations disregard the non-power benefits of the dam and assume that "the power producing dam, which inevitably confers other benefits, is as limited in its functions as the steam plant." While Jones and Krug considered other benefits in their ultimate opinion of value, they did not attempt any specific segregation, and proof is lacking as to any

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18. There is no evidence of any sales of power in the region at 8.55 mills. There is evidence of sales by Montana Power Company at rates ranging from 4.6 mills to 6.6 mills and sales by other utilities at various rates up to 7.5 mills, with most sales, however, substantially below that rate.

precise figures which may be attributed to specific benefits.[19]

With reference to benefits in addition to power generation, Krug testified:

> "A. The Yellowtail project is being constructed for multi-purpose operations and will provide substantial benefits for irrigation, flood control, siltation control, river level control, additional power generation at downstream projects and other purposes. The federal government has been following the policy of collecting nominal amounts or nothing whatsoever for these various benefits, but that does not make them any less real. It is a difficult matter, however, to assign a specific economic measure to these benefits. To be conservative in this case, I have not assigned to them any weight in reaching my judgment as to the value of the Crow Tribal lands taken for the damsite and reservoir." (Direct Testimony of Krug, p. 13.)

Krug called attention also to the fact that the project will provide recreational attractions as soon as the reservoir is filled.[20]

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19. This was recognized by plaintiff in its pretrial brief (p. 14); "We by no means suggest that an expert, however competent, should undertake to assign a specific money sum to each element of economic value, and then aggregate their sums. . . . Rather, competent experts should be permitted to express an over-all opinion on value after taking into account all relevant factors . . ."

20. Jones testified in pertinent part: "A. . . . Yellowtail is designed as a multi-purpose project to provide for flood control, irrigation, recreation, improvement of fish and wildlife habitat, and others. Some of these other benefits are obtained, in part, at the expense of the production of electric energy. . . . In other words, if Yellowtail Dam and reservoir were operated solely in order to maximize power production, the output would be greater than is currently estimated from the Bureau's multi-purpose project and reflected in the Bureau's estimate of power benefits." (Direct Testimony of Jones, p. 64.)

In view of the lack of testimony as to precise segregated values on non-power benefits, it seems advisable to quote from the Definite Plan Report, with particular reference to irrigation and recreational benefits. On irrigation benefits the Report reads in part:

> "The (Yellowtail) Unit is virtually indispensable to development of the Hardin Unit for the irrigation of more than 44,000 acres of new land, as well as numerous proposed pumping units dependent upon a source of low-cost power. In addition to providing such power for many of the 28 pumping Units of the Missouri River Basin Project remaining to be developed along the Yellowstone River, the water supply for 20 of these Units lying below the mouth of the Big Horn River will be improved by the effect of stream flow regulation and silt retention at Yellowtail. Any appreciable future increase in irrigation along the lower reaches of the Yellowstone River will be dependent upon upstream storage, a portion of which will be provided at Yellowtail, to prevent river stages from falling below diversion inlets in periods of low flow." (Vol. I at p. 1)
>
> * * *
>
> "A number of desirable irrigation pumping units along the Yellowstone, Tongue, and Powder Rivers cannot be undertaken without such a source of power, as the practical limit on transmission distance from the Fort Peck Project has been reached in this area. Several pumping units along the Big Horn River in northern Wyoming will also be dependent upon Yellowtail power when the output of the Boysen Power Plant is absorbed by its closer markets. Irrigable areas thus involved along the four streams total more than 180,000 acres." (p. 2)
>
> * * *

"Thousands of acres of excellent land lie close to the river, which has an abundant annual supply of water. With storage regulation this land can be irrigated and made more productive and virtually free from the threat of drought.*** Hydroelectric power is needed for irrigation pumping, domestic, industrial, and municipal uses, and the necessary storage regulation can readily be used or augmented to provide for needed flood control, silt retention, improvement of fish and wildlife resources, and recreational opportunities." (p. 11)

* * *

"From the standpoint of physical resources, Hardin Unit lands constitute one of the largest and best areas remaining available for irrigation development in the Missouri River Basin. Soils are alluvial, deep, properly permeable, friable, generally underlain by gravel, and have good productive capacity. Leveling requirements will be moderate and surface and subsurface drainage conditions are generally good." (p. 48)

The parties have stipulated (par. 15) that, "Yellowtail Dam and Reservoir will make possible irrigation downstream therefrom"; and that "The physically-associated irrigation project *** will irrigate about 45,800 acres of bench land just downstream from the dam ***." The stipulation continues; "The basic concepts followed in the financial evaluation of the Yellowtail development, as at all other developments which are a part of the Missouri River Basin Project, has been that each hydroelectric unit will contribute to the development of irrigation (pumping) equally, by associating a portion of the installed capacity in each generating unit with peak demand of irrigation pump-

ing power requirements, at the generator, in the proportion that the estimated maximum irrigation pumping power demand in the Basin relates to the ultimate installed generating capacity with full development of the natural resources as contemplated at the time in question. In 1959, this relationship resulted in some 22 percent of the installed generating capacity being associated with irrigation pumping demand requirements."

The Definite Plan Report contains the following reference to recreational benefits:

> "The proposed Yellowtail Reservoir, because of its outstanding scenic character and excellent fishing potentialities, is expected to influence a sizeable area in southern Montana and northern Wyoming. It should also attract a considerable number of tourists passing on U. S. Highway 10, 310, and 87, and Wyoming State Highway 14.
>
> * * *
>
> "The total expected annual use from outside the local zone has been estimated at 25,000 visitors." (p. 82)
>
> "Tangible primary benefits would accrue from the direct sale of commodities, food, equipment and clothing, and from services such as transportation, employment of guides, and provisions for shelter and lodging. Less tangible but nonetheless valuable benefits would accrue from certain revenues from increased taxes in higher land values, licenses, leases, and similar items. Monetary eva-

luation of recreational benefits is difficult, however, if not impossible." (p. 83)[21]

The Government conceded in its pretrial brief that if dam site value may be considered at all, values which may arise from the use and availability of the Yellowtail site "for power production, irrigation, domestic water supply and recreation" may be considered to the extent that these values are based upon values which a private developer could realize. The Government contends, however, that plaintiff is not entitled to compensation for any values arising from flood control, navigation, silt control and similar values cre-

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21. During the time the court has been working on this opinion there have been numerous news stories relative to the proposed development of an extensive recreational area at the Yellowtail Dam and Reservoir site. For example, a news dispatch from Washington on August 15, 1963, reads in part:

> "The proposed Big Horn Canyon National Recreation Area at the Yellowtail Dam and reservoir site would cost the federal government $7.7 million, but might yield as much as $1 million annually in benefits.
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> "The legislation would set aside 63,287 acres along the Big Horn River above Yellowtail Dam. It would include the Big Horn Canyon, 47 miles long with cliffs rising 800 to 2,000 feet. It would cover about a third of the 195-mile shoreline of Yellowtail Reservoir."

While this is hearsay, it is impossible for the court to ignore completely the highly publicized value of the site for recreational purposes. Moreover, defendant's brief on navigability (footnote 93) invites judicial notice "to the experience at Hoover Dam where a great new recreational industry has been built as the result of the dam construction."

ated by the Government's demand.[22] There is merit in the Government's position.

As counsel for plaintiff suggest in their post trial brief (p. 2), the "value" of lands of the special character here involved must be determined on the basis of the opinions of experts, and the "expert's ultimate opinion is to be weighed and evaluated *** in the light of his qualifications, the reasonableness of his methods, and the quality of the logic with which he supported his opinion." I agree. I consider all of the expert witnesses here well qualified. Unfortunately, however, I cannot accept in their entirety the conclusions of any one expert. Nor is this the type of case where it is possible to modify specific estimates of costs, values and other factors considered by the experts and arrive at specific findings accordingly. There are too many interrelated, complicated, intangible and uncertain factors of value and too many methods of using those factors.[23] All the court can do is evaluate as fully and fairly as possible both the stipuluated

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22. Counsel for plaintiff contend that flood control may serve "as the basis for reimbursement from the Government in accordance with proclaimed national policy." (Reply Brief, p. 16.) Jones testified regarding three instances where non-federal public agencies were reimbursed for flood control benefits and Patterson was familiar with one such case. On the other hand, Tower testified that some license projects have to bear these burdens without recompense. I cannot find that plaintiff has shown an established national policy of reimbursement for flood control benefits.

23. Plaintiff suggests in its reply brief (p. 15) that, "The re-analysis of all the hundreds of assumptons, explicitly and implicitly made by the witnesses, is beyond the legitimate scope of a reply brief." It is likewise beyond the scope of the court's opinion.

facts and the expert opinions and arrive at its own "informed guess" of the fair market value of the property taken.

The market value "may be deemed to be the sum which, considering all the circumstances, could have been obtained for (the property); that is, the amount that in all probability would have been arrived at by fair negotations between an owner willing to sell and a purchaser desiring to buy." While the court may not indulge in "mere speculation or conjecture," the determination must "be made in the light af all facts affecting the market value that are shown by the evidence taken in connection with those of such general notoriety as not to require proof."[24]

In establishing value in Indian Claims Commission cases,[25] neither the Commission nor the courts have attempted to allocate acreage or total valuations among the various factors considered.[26] Defendant contends that those cases are inapplicable since awards under the Indian Claims Commission Act are not made on the

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24. Olson v. United States, 1934, 292 U.S. 246, 255-57, 54 S. Ct. 704, 78 L. Ed. 1236. See also Kimball Laundry Co. v. United States, supra; United States v. Miller, 1943, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336; Mississippi & Rum River Boom Co. v. Patterson, 1879, 98 U.S. 403, 25 L. Ed. 206, 208.

25. Claims arising under the Indian Claims Commission Act of 1946, 25 U.S.C. §70, et seq.

26. See, for example: Rogue River Tribe of Indians v. United States, Ct. Cl. 1950, 89 F. Supp. 798, 803-07; Alcea Band of Tillamooks v. United States, Ct. Cl. 1950, 87 F. Supp. 938, reversed as to interest, 341 U.S. 48, 71 S. Ct. 552, 95 L. Ed. 738; Otoe and Missouri Tribe of Indians v. United States, Ct. Cl. 1955, 131 F. Supp. 265, 290.

basis of "just compensation," as the Act refers instead to the "quantum of relief." The courts and Commission in the Indian Claims Commission cases, however, as here, were confronted with the difficulty of segregating values. Accordingly, they simply arrived at a dollar per acre or total figure which fairly considered all factors deemed relevant. I conclude that the same practice is justified in this case, provided the values are limited to those which a non-governmental developer might reasonably expect to realize from the development of the site.

This case is unique in that there is a public record of past negotiations between the parties. These negotiations were expressly referred to in both the House and Senate discussions of the Conference Report on S.J.R. 12, which became Public Law 85-523.[27]

Long prior to the enactment of Public Law 85-523, Congress and its committees were concerned with the problem of compensating the Crow Tribe for the lands acquired. For many years the Department of the Interior, through its Bureau of Reclamation, negotiated with representatives of the Crow Tribe. The results of these negotiations were reported to the Senate Committee on Interior and Insular Affairs at a hearing on December 9, 1955. At that hearing the committee chair-

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27. The history of the negotiations, legislation, and litigation relating to compensation of the Crow Tribe was set forth in detail in the House by Congressman Haley, one of the House Conferees, and Congressmen Metcalf and Anderson of Montana. See 104 Cong. Rec., pp. 12975 to 12980.

man expressed the concern of Congress that "the Crow Indian Tribe * * * receive full and just compensation for rights-of-way needed for Yellowtail Dam and Reservoir" and the committee's regret that "negotiations did not proceed to the point where an agreement could be reached."[28]

S. J. Res. 135 passed by the 84th Congress, 2d Sess., provided for a payment of $5,000,000 (after passing the Senate for this amount, reduced in the House to $1,500,000, and amended to the Senate figure by the Conference Report). As noted supra, this bill was vetoed by the President on June 6, 1956 (see footnote 3). The report to the Senate accompanying S. J. Res. 135 (Report No. 1626) recited that the Crow Indian Tribal Council on January 11, 1956, upon the recommendation of its consulting engineer, had adopted a resolution offering to accept $5,000,000 for its con-

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28. It appeared from a report of Wilbur A. Doxheimer, Commissioner of the Bureau of Reclamation, that a 15 man special committee of the Tribe had recommended that the "Crow Tribe accept $5 million for outright sale of the right-of-way lands" or that they "grant a 60 year lease at an annual charge of $150,000." The Regional Director of the Bureau had advised the committee that the Bureau would prefer a lump sum payment, and that some basis would be necessary to justify a $5 million payment. He pointed out that the Bureau, in 1951, arrived at a figure of $1½ million. This allowed the Indians, for tribal lands, one-third of the power site value and allowed two-thirds of the power site value for private and public interest lands. The Regional Director proposed a three man appraisal board, which the negotiating committee approved. At subsequent meetings of the Crow Tribal Council, however, the recommendations of the committtee were rejected and a resolution adopted asking for an annual rental of $1 million for a 50 year period. (Report of Hearing on Yellowtail Dam — Hardin Unit, Montana before the Committee on Interior and Insular Affairs, U.S. Senate, December 9, 1953, Part 2.)

sent to the transfer of the right-of-way for the dam and reservoir. The Department of the Interior and Bureau of the Budget had approved the sum of $1,500,000. The Senate committee based its conclusion that a $5,000,000 payment was justified in part upon a comparison with the rental payments made for Kerr Dam.

The Senate version of S.J.R. 12 provided for a payment of $5,000,000. The House reduced that amount to $2,500,000. The Conference Committee Report, which was "intended to include both just compensation for the transfer * * * of all right, title, and interest of the Crow Tribe in and to the Tribal lands * * * and a share of the special value to the United States of said lands for utilization in connection with its authorized Missouri River Basin project, in addition to other justifiable considerations." The Act further provided that in any suit brought for an additional sum, "no amount in excess of the sum above stated shall be awarded unless the court finds that the whole of said sum is less than just compensation for all of the tribal right, title, and interest taken."

In a statement to the Senate explaining the Conference Report, Senator Mansfield, speaking for himself and Senator Murray, said in part:

> "The provisions of Senate Joint Resolution 12 as reported from the conference appear to be the most reasonable solution possible to the difficulties surrounding the transfer for the title of these

Indian lands. I have always felt and continue to feel that the Crow Indians deserve a settlement of at least $5 million. This was the figure agreed to by the tribal council, approved by the Senate last year and endorsed by the Congress in the 84th Congress. In addition there is ample support for such a payment based on engineering and legal data.

* * *

"However, to insure that the settlement can be made expeditiously, a compromise payment of $2,500,000 to the Crow Indian Tribe has been agreed to by the conference. The provisions of Senate Joint Resolution 12 set this payment as the floor and the Crow Tribe may appeal to the court of claims of the district court in Montana for additional compensation based on power site values, not now considered in the payment. I feel that the courts will have an obligation to award the tribe additional compensation based on the recent court decision handed down by Judge William Jameson in the Montana District Court.[29]

* * *

"The Crow Indians, as do all Indians, constitute a special case, well established in our laws. The provisions of Senate Joint Resolution 12 give the Crow Tribe a sound base for settlement and allows them to appeal to the courts for additional compensation. The passage of this joint resolution will

29. Referring to United States v. 5,677.94 acres of land, etc., 1958, 162 F. Supp. 108.

assure the Indians that they have this additional course of action." (104 Cong. Rec., p. 13006.) [30]

While the past negotiations and the concern of Congress that the Crow Tribe be fully compensated are not evidence of value in determining the amount of just compensation, they cannot be overlooked entirely in a case of this nature, involving, as it does, so many intangible factors and express and implied promises and assurances to the plaintiff tribe.

As an additional reason why power site value should not be considered, the Government argues that the plaintiff does not own a sufficient portion of the site to accommodate the location of a power project.[31] It is undisputed, however, that the dam, powerhouse and switchyard are all located on the lands acquired from

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30. In the House, Congressman Anderson said in part: " . . . I am disappointed that this legislation does not provide more than $2½ million as an initial payment to the Crow Indians for this dam site. Two different engineers who appraised this site for the Government said it was worth more than $4½ million. Mr. Barry Dibble, an engineer who appraised the site for the Crow Tribe, reported that it was worth $5 million. I think we might well have accepted the Senate figure of $5 million in full settlement, since the Crow Tribe has indicated that they regard this as a fair figure." (104 Cong. Rec., p. 12980.)

31. As quoted supra, (footnote 12) the Crow Allotment Act provided that lands "chiefly valuable for the development of water power shall be reserved from allotment or other disposition for the benefit of the Crow Tribe of Indians." Presumably the United States determined what lands should be reserved. It seems probable that some of the allotted Indian lands and possibly some of the private lands within the taking area were a part of the Reservation at the time of the enactment of the Crow Allotment Act, but this cannot be determined from the record.

plaintiff. In its pretrial brief (p. 33) plaintiff argued that the "Crow Tribe alone holds the unavoidably necessary lands, and whether any other lands would ever be utilized is too remote or speculative to attribute any dam site or water power value to them." On the other hand, defendant contended that plaintiff owns but 20 percent of the land required for the Government's dam and reservoir project and that "the value of the Indians' interest in the Yellowtail dam and reservoir site cannot be based on the value of a dam which will flow five times the area of the land owned by plaintiff," but "must be based on a dam which will flow only the area owned by the plaintiff." (Defendant's pretrial brief, p. 21.)

As set forth in the court's pretrial memorandum, only the lands of the Crow Tribe are encompassed by the Crow Allotment Act. Other landowners may not claim water power value in determining the fair market value of their lands. A private purchaser of the Crow lands, interested in acquiring a dam site and building a dam equal to Yellowtail, presumably would be willing to pay dam site or water power value to the Crows for a dam impounding water over the entire area, less the cost of necessary acquisitions of non-Crow lands at

their fair market value, which would not include water power value.[32]

As noted supra (footnote 10), in computing net benefits Tower computed the Crow's proportionate share at 31.3 percent to 37.7 percent in arriving at site values of $1,280,000 to $1,540,000. Patterson testified in rebuttal (Tr. p. 599) that the Crow Tribe should receive only an 18 percent share since the lands in question represent 18 percent of the total taking area. On the other hand, Jones testified that it would be reasonable to award the Crow Tribe 60 percent as the percentage of the Yellowtail Reservoir actually stored on Crow-contributed lands. Plaintiff argues the Government is taking extensive additional land for such purposes as flood control and recreation and that all of this land is not needed for a single purpose power project.

Again, I cannot agree completely with any of the experts, although I think Dr. Jones' approach is more

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32. Roger J. Theusen, defendant's appraiser, estimated the costs of acquiring reservoir lands not owned by the Crow Tribe, as follows:

Market value of private lands	$ 966,000
Market value of state lands	51,000
Market value of allotted Indian lands	18,500
Capitalized rental value of public lands	504,340
Acquisition costs	67,500
Funds to cover condemnations	246,000
Total	$1,853,340

(p. 13, Statements of defendant's witnesses.)

He estimated a "holdup" value of $3,737,340 if the acquiring agency did not have the right of eminent domain, particularly if the "acquiring agency had paid $2,500,000 for some 6,000 acres of inaccessible mountain land . . . ." (p. 14)

nearly correct. It seems obviously unfair to use Patterson's 18 percent, particularly in view of the fact that he made no allowance for any of the so-called collateral benefits, and I must conclude that Tower's estimates of 31 percent to 37 percent are too low. On the other hand, if development for recreation is taken into consideration in awarding just compensation, more land would be required than for a single purpose power project. It would be necessary accordingly to discount Jones' estimate of 60 percent.

It is impossible to arrive at an exact figure, but consideration must be given to recreation benefits with respect to both land required and the award of just compensation to the Crow Tribe. In addition, consideration must be given to the fact that the dam, powerhouse and switchyard are all being constructed on Crow lands and that these lands are the only lands for which water power value may be allowed.

There remains for consideration the question of whether the Big Horn River is navigable. Although not necessary to the decision in view of my conclusion that water power value may be considered in determining just compensation, it is advisable to rule upon this question in the event a higher court should determine that my conclusions with reference to just compensation are erroneous.

The Government contends that the river is navigable at the site of the Yellowtail project; the plaintiff con-

tends that it is not. The burden of persuasion rests with the party urging navigability. *Harrison v. Fite,* 8 Cir. 1906, 148 F. 781, 785.

The Wind and Popo Agie Rivers originate in Wyoming. At their confluence, near Riverton, Wyoming, they form the Big Horn River. This river flows northward, crosses the Wyoming-Montana line, and eventually flows into the Yellowstone River, which in turn flows into the Missouri River. A short distance north of the Wyoming-Montana line the Big Horn River enters the Lower Big Horn Canyon. It is within this canyon that the Yellowtail project is under construction.

The parties have presented excellent and exhaustive historical analyses of the uses which have been made of the Big Horn River. There is little disagreement as to the historical facts. It is agreed that in 1825, under General Ashley, fur trappers used the river to transport their furs to St. Louis. The parties disagree on whether the point of embarkation of the trappers was upstream or downstream from the Lower Big Horn Canyon. The plaintiff contends that the evidence shows the trappers took to the river after crossing the Big Horn Mountains — after they were already to the north and downstream side of the canyon. The Government argues that the point of embarkation was on the south side of the Big Horn Mountains and upstream from the canyon; in other words, that the trappers

in effect "shot the rapids" through the Lower Big Horn Canyon.

Reference is made by both parties to alleged usage of the river by other trappers, again with disagreement as to the point of embarkation. The parties do agree that in 1858, three men went down the river through the canyon. The parties agree that steamboats penetrated as far up the Big Horn River as the site of the present town of Hardin, on the downstream or north end of the Big Horn Canyon.

Plaintiff relies primarily on difficulty of navigation as the basis for its claim of non-navigability. It introduced evidence concerning the length of time the river is frozen over during the winter, evidence of ice jams, and affidavits concerning the heavy silt content of the river, with consequent rapid build up of sand bars. Further evidence was presented as to the rapids, boulders, etc. which make it difficult to traverse the river through the canyon itself, as well as evidence of the lack of a need for navigation on the river.

The Government submitted affidavits which compared the depth of the river, its average flow and average gradient with certain other rivers which have been held navigable, demonstrating that the Big Horn compares favorably with such rivers as far as physical characteristics are concerned.

A qualified hydrologist, in an affidavit received in evidence, expressed his opinion that the river could, with relatively little cost and work, be made navigable both up and downstream by removal of some 150 boulders and by building some small locks. There was further evidence of many persons who have "shot the rapids" through the canyon in recent years, testifying to the easy passage and pleasant voyage.

There is no way to reconcile the opinions of the various persons whose affidavits were taken. In the opinion of oldtimers the river is treacherous and dangerous, and navigating it through the canyon is fraught with danger. Furthermore, the heavy silt content builds up sand bars so rapidly that channels change, causing further navigation problems. On the other hand, the affidavits of weekend pleasure seekers who traveled down the river in all manner of boats testify to the easy and pleasant passage which the trip allows.

In any event, it is clear from the evidence that the river could be made navigable. Although for certain parts of the year it might be impassable because of ice, it is well settled that this fact alone will not prevent navigability; nor will the presence of sand bars. *U.S. v. Appalachian Power Co.,* 1940, 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243; *Economy Light & Power Co. v. United States,* 1921, 256 U.S. 113, 41 S. Ct. 409, 65 L. Ed. 847. Thus in the Appalachian case it was said in 311 U.S. at 408-409: "There has never been doubt

that the navigability referred to in the cases was navigability despite the obstruction of falls, rapids, sand bars, carries or shifting currents." And in the *Economy Light & Power* case, in 256 U.S. at 122 the Court said: "Navigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasional natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water."

The physical characteristics of the river do not prevent its classification as navigable. Especially is this true in view of the holding in the *Appalachian* case that the river need not be navigable in its natural or unimproved state. Thus it was said that:

> "To appraise the evidence of navigablity on the natural condition only of the waterway is erroneous. Its availability for navigation must also be considered. 'Natural and ordinary condition' refers to volume of water, the gradients and the regularity of the flow. A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken. Congress has recognized this in § 3 of the Water Power Act by defining 'navigable waters' as those 'which either in their natural

> or improved condition' are used or suitable for use." (311 U.S. at 407.) [33]

It is true, as plaintiff contends, that the *Appalachian* case recognized that there are "obvious limits to such improvements as affecting navigability," and that, "There must be a balance between cost and need at a time when the improvement would be useful." (311 U.S. at 407-8). On the other hand, the Court said further: "Use of a stream long abandoned by water commerce is difficult to prove by abundant evidence. * * * Nor is lack of commercial traffic a bar to a conclusion of navigability *where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.*" (Emphasis added.) (311 U.S. at 416.)[34]

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33. The district court had found that the river was not in fact navigable. The court of appeals affirmed. It was recognized that the opinions of the lower courts were in accord with prior rulings of the Supreme Court on the basic concept of navigability, including The Daniel Ball, 10 Wall. 557. In a dissenting opinion, Mr. Justice Roberts said in part: "But further the court holds, contrary to all that has heretofore been said on the subject, that the natural and ordinary condition of the stream, however impassable it may be without improvement, means that if, by 'reasonable' improvement, the stream may be rendered navigable then it is navigable without such improvement; that 'there must be a balance between cost and need at a time when the improvement would be useful.' . . . If this test be adopted, then every creek in every state of the Union which has enough water, when conserved by dams and locks or channelled by wing dams and sluices, to float a boat drawing two feet of water, may be pronounced navigable because, by the expenditure of some enormous sum, such a project would be possible of execution. In other words, Congress can create navigability by determining to improve a non-navigable stream." (311 U.S. at 433.)

34. See also United States v. Utah, 1931, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844; Montana Power Co. v. Federal Power Commission, D.C. Cir. 1950, 185 F. 2d 491, 494-95; United States v. Wallace, D. Ida. 1957, 157 F. Supp. 931.

On the basis of the *Appalachian* case, I cannot escape the conclusion that the Big Horn must be deemed a navigable river.

In arriving at the amount of just compensation to which plaintiff is entitled, I am taking into consideration all of the expert testimony, all of the stipulated facts and exhibits received in evidence, and all of the factors hereinabove set forth. In particular:

1. I cannot accept in its entirety the opinion of any of the expert witnesses for either party, and I find that each opinion is subject in part to the objections and criticism expressed by the adverse witnesses.

2. The lands acquired by defendant from plaintiff are very well adapted for the construction of a hydroelectric dam and have long been recognized as a potential dam site. In the Crow Allotment Act of 1920 Congress specifically provided that tribal lands chiefly valuable for the development of water power should be reserved from allotment or other disposition for the benefit of the Crow Tribe.

3. Defendant is constructing a multi-purpose dam designed to "provide for irrigation, flood control, power generation, silt retention, improvement of fish and wildlife resources, recreational opportunities, municipal-industrial water and other benefits."

4. (a) The dam, powerhouse and switchyard for Yellowtail dam and reservoir are all being constructed

on the lands acquired from plaintiff; (b) in awarding just compensation the Crow Tribe is entitled to dam site or water power value, whereas this is not true of other lands acquired for the dam and reservoir; (c) in computing "net benefits" and arriving at an award of just compensation for plaintiff's lands, plaintiff is entitled to substantially more than an amount based solely on the precentage of the total taking area represented by the plaintiff's lands.

5. Congress many times has manifested its intent that the Crow Tribe receive full and just compensation for the lands acquired. The results of extensive negotiations with the Crow Tribe by the Department of the Interior, through its Bureau of Reclamation, have been reported to Congressional committees, and by the committees to Congress.

6. Both Congress and the Department of the Interior have recognized the dual role of the Department as trustee of the Indian wards and as representative of the defendant in acquiring the tribal lands. In the rental of private utilities of power sites owned by other Indian tribes (the Warm Springs and Flathead tribes), the Department has been zealous in requiring payment of full rental value for the sites. The Crow Tribe is entitled to the same consideration in the acquisition by the defendant of its power site.

7. By reason of dissimilarities between the present acquisition and rental of the Warm Springs and Flat-

head sites, the testimony of all the expert witnesses with respect to value based on a comparison with the rental agreements for those sites is of limited value, but has been considered with all the evidence in arriving at the amount of just compensation.

8. The plaintiff has failed to show that as of July15, 1958, or today, there was any single purpose power project, or that any private utility was interested in doing so.

9. While there is a market for the power which will be produced from Yellowtail Dam, and private utilities would purchase this power at their "best alternative cost," plaintiff has failed to show that any private utility would pay an average of 8.5 mills for the power.

10. It now appears that the dam will have a generating capacity of 250,000 kw instead of 200,000 kw, and this results in some increase in site value.

11. The dam is being constructed primarily as a peaking plant, and its peaking capacity renders the power more valuable, perhaps by as much as 10 percent, than power from a comparable steam electric plant.

12. In addition to power, substantial benefits will accrue from increased irrigation and the development of recreational areas. By reason of the inter-

relation of allocation of both costs and benefits, the precise value of these benefits cannot be segregated from the power benefits.

13. In awarding just compensation, values which arise from the use and availability of the Yellowtail site for irrigation and recreation, as well as power production, may be considered to the extent that they could be realized by any private developer of the site. Plaintiff is not entitled to an award based on flood control, navigation, silt control and similar values created solely by defendant's demand.

14. Giving consideration to all of the factors herein discussed and all of the evidence, I find that the amount of just compensation for all of the tribal right, title and interest taken is $4,500,000, and that plaintiff is entitled to judgment in the sum of $2,000,000, with interest from the date the lands were transferred to the defendant.

Counsel for plaintiff will prepare, serve and lodge form of judgment pursuant to Rule 11(b) of the Local Rules of Court.

Done and dated this 1st day of October, 1963.

W. J. JAMESON
United States District Judge